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NEGLIGENCE IN LAW.

BEING

THE SECOND EDITION

OF

PRINCIPLES OF THE LAW OF NEGLIGENCE.

RE-ARRANGED AND RE-WRITTEN

BY

THOMAS BEVEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

*Simus ea mente, quam ratio et veritas præscribit, ut nihil in
vita nobis præstandum præter culpam putemus.*

CICERO, AD FAM. 6, 1.

VOLUME I.

GENERAL RELATIONS.

LONDON:

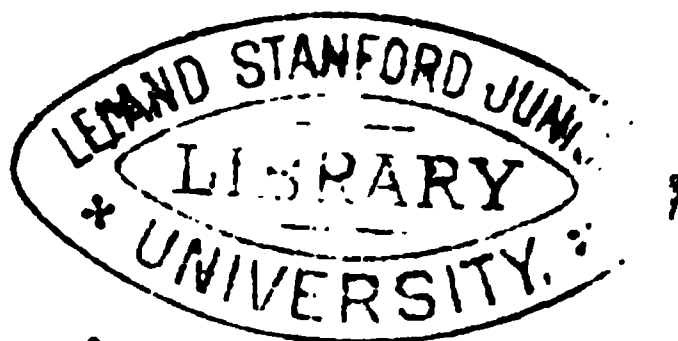
STEVENS AND HAYNES,

Law Publishers,

13, BELL YARD, TEMPLE BAR.

THE BOSTON BOOK CO., BOSTON.

1895.



A27192.

*Printed by BALLANTYNE, HANSON & CO.
At the Ballantyne Press.*

PREFACE.

THESE volumes may be regarded as a second edition of my "Principles of the Law of Negligence" in so far as the subjects treated of in both books are the same, and the materials collected in the one have been used without reserve for the other. As to anything beyond this the present is a new work. The arrangement is altogether different from that previously adopted. Nearly a half of the contents of the present volumes is absolutely new, and of the remainder there is very little which has not been materially modified, if not in substance yet in expression.

In the heavy and laborious task of seeing the sheets through the press I have been greatly assisted by my friend Mr. William Feilden Craies, of the Inner Temple and the Western Circuit. He kindly undertook to read the proof-sheets for me and to verify the cases cited in the notes, and has been unwearied during many months in correction, criticism, and suggestion. Even had the book been his own he could not have shown a keener interest in its progress, or worked with a more unflagging energy.

The various tables of references to the Civil Law, the Year Books, and the more modern cases, together with the table of statutes, are the work of Mr. Riches, the librarian of the Inns of Court Bar Library. There are, I believe, in all somewhere about 16,000 references to various authorities quoted in these volumes. Reckoning half this number as independent cases, the work of sorting, arranging, and tabulating them, would manifestly be a task of no light labour. But in most instances there are two or

three different reports to be referred to, and in many instances four or five, which must have added to the labour involved in a like proportion.

I am well aware that the usefulness of a law treatise is considerably dependent on the accuracy of its table of cases; I am, however, confident my book will not suffer from any shortcomings in this respect, and that Mr. Riches's work will be found as exact as I know it has been laborious.

The quotations from the Digest and the Code are, as a rule, made from the folio Elzevir edition of 1663; but occasionally, the Amsterdam edition of 1700 has been used.

References are given to the Revised Reports up to and including the eighteenth volume.

My obligations to the various treatises that I have used are, I believe, fully acknowledged in immediate connection with the passages in which they are referred to. There is one book, however, which I have perhaps used more constantly than any other single work throughout the preparation of these volumes, yet which from its nature does not permit of my making a detailed acknowledgment of the aid it has afforded me. I therefore gladly seize this opportunity of expressing my obligations to Messrs. Talbot and Fort's "Index of Cases Judicially Noticed," a work which when judiciously interrogated gives an admirable history of English cases, and of the development of the leading principles of the common law.

THOMAS BEVEN.

1 TEMPLE GARDENS, E.C.

May, 1895.

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ADDITIONS AND CORRECTIONS.

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100n¹ *add* Cp. Halestrap *v.* Gregory (1895), 1 Q. B. 561.

132n⁵ *read* 2 H. & C. 722.

159n⁴ *add* Cp. Captain Boyton's World's Water Show Syndicate (Limited) *v.* Employers' Liability Assurance Corporation (Limited), 11 Times L. R. 384.

184n¹ *add* Fenna *v.* Clare (1895), 1 Q. B. 199.

The reason given for this decision, "that you start with the established fact that the defendants were guilty of a nuisance *which might have caused the injury*," is practically the same as that which was demonstrated to be so unsatisfactory in the Story of the Hunchback in the Arabian Nights. See Arabian Nights (Lane's Ed.), chapter v., commencing with part of the Twenty-fourth night, &c.

In Scholfield *v.* Earl of Londesborough (1895), 1 Q. B. 536 at 553, Rigby, L.J., states the rule of law to be that "if in a case that turns on a question of negligence, the evidence leaves the matter in doubt, those who set up the negligence must fail, for it is not sufficient to show only that the state of facts is consistent with negligence."

See Onus of Proof : II. Evidence of Negligence, 148-167.

200n¹ *to* Wegg-Prosser *v.* Evans, *add* affirmed in C. A. (1895), 1 Q. B. 108.

248 *see post* 1347, where the sections of the Merchant Shipping Act, 1894, are referred to.

267n¹ *add* The Queen *v.* London & North Western Ry. Co. (1894), 2 Q. B. 512.

278n² *add* Anderson *v.* Gorrie (1895), 1 Q. B. 668.

305 line 7 *delete* "and coroners." *See* 51 & 52 Vict. c. 41, s. 5.

335n¹ *for* Maund *v.* Monmouth Ry. Co. *read* Maund *v.* Monmouthshire Canal Co.

355n⁴ *add* Municipal Council of Sydney *v.* Bourke, 11 Times L. R. 403.

359n⁵ *add* Cp. Saunders *v.* Holborn District Board of Works (1895), 1 Q. B. 64.

372n¹ *for* Reg. *read* Rex twice.

418n⁴ *to* Baird *v.* Mayor, &c., of Tunbridge Wells *add* (1894) 2 Q. B. 867.

435 *after* Etherby Grange Coal Co. *v.* Auckland District Highway Board, *add* Kent County Council *v.* Vidler (1895), 1 Q. B. 448 ; and Mayor, &c., of Wolverhampton *v.* County Council of Salop, 11 Times L. R. 386.

440n² *add* Corporation of Bradford *v.* Pickles (1894), 3 Ch. 53, overruled (1895), 1 Ch. 145 ; and now standing for judgment in the House of Lords.

454n² *add* Minehead Local Board *v.* Luttrell (1894), 2 Ch. 178.

455n² *add* Self *v.* Hove Commissioners (1895), 1 Q. B. 685.

455n⁶ *read* 8 & 9 Vict. c. 18.

459n² *add* Yorkshire West Riding Council *v.* Holmfirth Urban Sanitary Authority (1894), 2 Q. B. 842.

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473n⁸ *add* Koelsch v. Philadelphia Co., 152 Pa. St. 355, 34 Am. St. R. 653; and Chapman v. Fylde Waterworks Co. (1894), 2 Q. B. 599.

483n¹ *to* Lemmon v. Webb *add* (1895) App. Cas. 1.

490n² *add* Copp v. Aldridge, 11 Times L. R. 411.

514n¹ *add* after sec. 141, Saunders v. Holborn District Board (1895), 1 Q. B. 64.

566n⁸ *add* Gill v. Edouin, 11 Times L. R. 378 (C. A.).

585 *add* to paragraph ending "use of their land," a note; *see* Corporation of Bradford v. Pickles (1894), 3 Ch. 53, overruled (1895), 1 Ch. 145; and now standing for judgment in the House of Lords.

596 *add* to conclusion of paragraph on Freemantle v. London & North-Western Ry. Co., a note; *see* Earl of Shaftesbury v. London & South-Western Ry. Co., 11 Times L. R. 126, 269 (C. A.).

607n⁵ *add* Marshall v. Taylor (1895), 1 Ch. 641.

612n² *after* Lemmon v. Webb *add* (1895), App. Cas. 1.

656n⁴ *see* the comment on Illidge v. Goodwin in Gwilliam v. Twist (1895), 1 Q. B. 557 at 559.

706n⁵ *add* Gwilliam v. Twist (1895), 1 Q. B. 557, reversed in the Court of Appeal 11 Times L. R. 415, on the ground that no necessity to employ assistance was shown.

There is no authority that I am aware of *other* than this case in the Divisional Court for the proposition that "a servant has an implied authority in cases of sudden emergency to appoint another person to act as a servant on his master's behalf." The case of Hawtayne v. Bourne, 7 M. & W. 595, is a distinct decision to the contrary. There Parke, B., with the concurrence of Alderson & Rolfe, BB., held that "the law provides for that which is common—not for that which is unusual." Cp. The Schwan (1892), P. 419, per Fry L. J. at 431.

714n¹ *add* Dyer v. Munday (1895), 1 Q. B. 742.

"If, in the course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable,"—even if the excess complained of amounts to the commission of a criminal offence.

756n¹ *add* Union Pacific Ry. Co. v. Daniels, 152 U. S. (45 Davis) 684.

861n² *add* M'Cord v. Cammell, 11 Times L. R. 274 (C.A.).

981n⁴ *add* Cp. Halestrap v. Gregory (1895), 1 Q. B. 561.

987n⁴ *after* Helby v. Matthews (1894), 2 Q. B. 262 *add* reversed in the House of Lords, 30 May, 1895.

1181n² *to* Taylor v. Manchester, Sheffield & Lincolnshire Ry. Co. (1895), 1 Q. B. 134, *add* Explained Kelly v. Metropolitan Ry. Co., 11 Times L. R. 366 (C. A.).

1239n⁴ *add* Meux v. Great Eastern Ry. Co., 11 Times L. R. 315—a case, in my opinion, wrongly decided. A trespass was admitted—plaintiff's property was actually injured by direct violence. The defendants were therefore put either to justify or excuse their act (*see* post 663-685). Now the Act does not admit of justification. The defendants, then, to exonerate themselves must excuse their trespass. It is, however, settled law that "no man shall be excused of a trespass except it may be judged utterly without his fault" (Weaver v. Ward, Hob. 134); and in the present case fault was admitted.

Moreover, the decision leads to an absurdity, *e.g.*, A lends his watch to B, who, wearing it while travelling on a railway, is negligently injured by the company without negligence on his part. B cannot recover for the injury to the watch, because he is not answerable over (Claridge v. South Staffordshire Tramway Co. (1892), 1 Q. B. 422, and post 884-887); and—per Mathew J.—A cannot recover, because he has no contract with the railway company.

The consideration of the words of Smith, L.J., in Kelly v. Metropolitan Ry. Co., 11 Times L. R. 366, may make the matter plain: "If the cause of complaint be for an act of omission or nonfeasance which, without proof of a contract to do what has been left undone, would not

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give rise to any cause of action at all, because no duty apart from contract to do what is complained of exists, then the action is founded upon contract and not upon tort ; if, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from the relation only, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort."

Even if the goods were "unlawfully" on the railway company's premises, they must not with impunity be wilfully injured. Neither must they be injured negligently : for "in trespass innocence of intention is no excuse" : per Lord Mansfield, C.J., *Tarlton v. Fisher*, 2 Doug. 671. See also per Bramwell, L.J., *Hayn v. Culliford*, 4 C. P. Div. 182 at 185.

1522ⁿ add *County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Company* (1895), 1 Ch. 629.

BOOK I.
CONSTITUTIVE PRINCIPLES.

NEGLIGENCE IN LAW.

BOOK I.

CONSTITUTIVE PRINCIPLES.

CHAPTER I.

PRELIMINARY MATTER.

THE investigation of Negligence in law, the subject of the ensuing treatise, does not undertake the analysis of any particular class of legal relations. It has to do with legal duties generally, though in a special aspect; that is, with duties as they appear when the normal standard of performance is not attained; and is thus primarily occupied with considering defaults in conduct, and only secondarily with the adequate discharge of obligations. It deals with an aspect, not with a division, of law. A complete treatise on Negligence in law would be a commentary on the whole law of England, from the standpoint of a non-fulfilment of legal duties, excluding only intentional wrongdoing. In practice, however, such a treatise would be unsatisfactory, as dealing obliquely with subjects much more conveniently dealt with directly; and redundant, as involving a not inconsiderable amount of repetition; since the principles applicable to certain leading relations are constantly reproduced in details. The adequate treatment of Negligence in law must, notwithstanding, range over a very considerable number of topics and involve minute treatment of not a few.

The definition of negligence most often given is that by Alderson, B.¹—“the omission to do something which a reason-
Alderson, B.’s, definition.

¹ *Blyth v. Birmingham Waterworks Company*, 11 Ex. 781, at 784; 25 L. J. Ex. 212, at 213. In the *Law Journal* report the words “guided upon those considerations which ordinarily regulate the conduct of human affairs” are omitted. Compare per Bigelow, C.J., in *Sweeny v. Old Colony and Newport Railway Company*, 92 Mass. 368, 372. Alderson, B.’s, language is amplified though his sense is closely followed in an approved United States definition of negligence, which, says Swayne, J., in *Railroad Co. v. Jones*, 95 U.S. (5 Otto) 439, 441, is “the failure to do what a reasonable and

able man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." This, though invaluable as a description, is too wide for a definition; since its terms include even improvident business enterprises, which in their undertaking hold out employment, in their collapse involve ruin, perhaps to thousands; but which, in spite of omissions and commissions of which no reasonable man would be guilty, yet bring in their train no legal responsibility whatever.

Austin's.

The most formally scientific analysis of negligence is that of Austin.¹ He draws a distinction between negligence, heedlessness, and rashness, which, though closely allied, "are broadly distinguished by differences."

In cases of negligence, the party performs not an act to which he is obliged; he breaks a positive duty.

In cases of heedlessness or rashness, the party does an act from which he is bound to forbear; he breaks a negative duty.

In cases of negligence, he adverts not to the act which it is his duty to do.

In cases of heedlessness, he adverts not to *consequences* of the act he does.

In cases of rashness, he adverts to the consequences of the act; but by reason of some assumption *which he examines insufficiently* he concludes that those consequences will not follow the act in the instance before him.

Discussed.

The view of negligence which commends itself to Austin is that "it applies exclusively to injurious omissions—to breaches by omission of positive duties." Whatever its philosophic value, this view circumscribes negligence in far too narrow limits for the purposes of practical jurisprudence. For example, the servants of a farmer, to save themselves trouble, leave a roller by the side of a highway, with its shafts slightly projecting over the metalled part of the road. The plaintiff's pony shies at it as the pony is driven past, and plaintiff's wife is thrown out of her carriage and killed. In an action "for wrongful and negligent user by the defendant of the highway," the plaintiff is entitled to recover.² Now this act does not appear to have been done by the servants with intention to test the *right* to act as they did, but merely to save themselves trouble; so that it is not comprehended in that class

prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may be in omission or commission. The duty is dictated and measured by the exigencies of the occasion." That is, negligence is always relative to some circumstance of time, or place, or person, or thing.

¹ Lectures on Jurisprudence, lecture 20.

² Wilkins v. Day, 12 Q. B. D. 110.

of nuisances which are wilful as distinguished from negligent; and being negligent is negligent in what is done, and not through the omission of precaution in the doing it. Again, the distinction drawn between negligence on the one hand and heedlessness and rashness on the other may be valid in the regions of pure speculation, yet for practical purposes the law can draw no distinction between the driver who runs into a vehicle without looking where he is going, and the driver who runs into a vehicle because he does not trouble to draw up, or is willing to take the risk of rash action on the chance of the consequences not following. Whether an act is in Austin's sense negligent or heedless or rash, in law it is comprehended under the term negligent act—sharply distinguished on the one hand from that class of acts in which there is either actual intent, or those circumstances from which the law draws the conclusion of intent; and, on the other hand, from those acts which are the result of inevitable chance, and are known as accidents in the narrow sense.¹

Dr. Wharton² describes negligence in its civil relations as Dr. Wharton's definition. "such an inadvertent imperfection by a responsible human agent in the discharge of a legal duty as produces in an ordinary and natural sequence a damage to another." Now inadvertence in its Discussed. ordinary meaning is closely allied, if not synonymous, with heedlessness; whereas the scope of negligence is much wider than that of mere heedless or inadvertent acts, and extends to neglects of which the consequences are clearly foreseen, though not willed; as the allowing a drain-pipe to be stopped and thereby causing a flood; where the injurious consequence has clearly been foreseen, though, through *inertia* of the person whose duty it was to clear it, no precaution has been taken. This is neither an inadvertent act, since the consequences are foreseen; nor yet a wilful one, since they are not willed; the negligent person trusts to the chapter of accidents or to the act of some third person to save him from the consequences of his sluggishness.

In *Heaven v. Pender*,³ Brett, M.R., gave his definition of Brett, M.R.'s definition. negligence: "Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property." The

¹ There is a valuable discussion of the metaphysical conception of negligence, with a consideration of the Aristotelian definitions, in Poste, *Gaius*, 3rd ed. 12-15. Hearn, *Legal Duties and Rights*, Acts done at one's peril, 100-111, may also with advantage be looked at. See *Cornish v. Accident Ins. Co.*, 23 Q. B. Div. 453, at 456, per Lindley, L.J.

² *Law of Negligence*, § 3.

³ 11 Q. B. Div. 503, 507.

Objections.

patent objection to this is that it only deals with one kind even of actionable negligence; since all those cases where, from position or contract, one is bound to use more than ordinary care or skill towards another are excluded by the expression. Thus the law discriminates between the amount of care that must be exercised between children and adults,¹ but the definition admits no flexibility in this respect whatever. Again, apart from the verbal objection, the definition introduces the conception of contributory negligence, a complex and more difficult term than negligence itself, which at present we are not in a condition to grapple with.

Messrs. Shearman and Redfield's definition.

Messrs. Shearman and Redfield say: "Negligence constituting a cause of civil action is such an omission by a responsible person to use that degree of care, diligence, and skill which it was his legal duty to use, for the protection of another person from injury, as, in a natural and continuous sequence, causes unintended damage to the latter."² But this does not include the negligence of a competent servant; for which the master is responsible. If the servant is incompetent to the knowledge of the master, the master, being a responsible person, is liable for entrusting work to an incompetent servant. If the servant is competent, then the master has done his duty; and if the person injured is a fellow-servant, the master is not liable, on the ground that he had done his duty. Yet, in the event of injury being done to a third person, he is liable, and his liability is dependent, not on any amount of care, diligence, and skill he could or ought to have exerted, but, on the simple issue whether the *servant* had exercised the care due to the injured person. True, the servant is, for the purposes of personal liability, a responsible person.³ Still, in law, the master is no less guilty of negligence though there has been no omission by him of that degree of care, diligence, and skill which it was his legal duty to use; now this liability of the master finds no place under the terms of the definition.

Objections.

Again, an inadvertently unlawful positive act, as, for example, placing a roller on a highway, is not in any usual sense the "omission of care," &c., "for the protection of another person from injury," since, provided the act is to be done, it may be done with all circumstances of extremest care; the negligence is the not ascertaining its unlawfulness previously to

¹ "The old, the lame, and the infirm are entitled to the use of the streets, and more care must be exercised towards them by engineers than towards those who have better powers of motion"; per Hunt, C.J., *O'Mara v. Hudson River Company*, 38 N. Y. 445, at 449.

² Shearman and Redfield, *Negligence*, § 3.

³ *Osborne v. Morgan* (1881), 130 Mass. 102, where the English authorities are collected.

determining on the act. There is no omission to use care, diligence, and skill for the protection of another person, for all that the case admits of has by hypothesis been done. The negligence is acting at all, though the act, being determined on, is done with all possible precaution.

The analysis of a cause of action on negligence by the same Analysis. authors seems unexceptionable. They say: Negligence consists in—

- (1) A legal duty to use care ;
- (2) A breach of that duty ;
- (3) The absence of distinct intention to produce the precise damage, if any, which actually follows.¹

With this negligence, in order to sustain a civil action, there must concur—

- (4) Damage to the plaintiff ;
- (5) A natural and continuous sequence uninterruptedly connecting the breach of duty with the damage as cause and effect.

Sir James Stephen² defines negligence to be “the omission to perform a duty imposed by law.” It is clear that this does not discriminate negligent acts from maturely meditated acts, since omission is equally consistent with design as with inadvertence. Sir James Stephen continues: “The word [negligence] is used in criminal law principally in reference to the infliction of bodily injury by neglecting to perform one of the duties which are by law imposed on various persons for the preservation of human life.” As a fact the accuracy of this statement is undoubted, as the statement of a principle of law it leaves much to be desired. The term criminal negligence has reference mainly to the authority by whom reparation is sought. An inseparable accident of criminal negligence may be that it is a violation of duty imposed for the preservation of human life. It is criminal because it constitutes a violation of obligations to the State, and which can only be remitted by the State. Criminal negligence *per se* does not differ from negligence simply. The same negligence as it

Sir James
Stephen's de-
finition.

Criminal negli-
gence.

¹ *I.e.*, the absence of distinct legal intention, which includes not only the absence of actual intention, but of those facts from which, independent of actual intention, the law makes the presumption of intention.

² A General View of the Criminal Law of England (2nd ed.), 76 ; see also the same author's Digest of the Criminal Law, ch. 22, Art. 211. “Death or bodily injury caused by omission to discharge a legal duty.” *The Queen v. Salmon*, 6 Q. B. D. 79 ; Foster Crown Law, Discourse II. Of Homicide, § 4, 262 ; Roscoe, Criminal Evidence (11th ed.), 718–723 ; 1 Russell, Crimes, Bk. III., ch. 2, § 5 (5th ed.), 822. Criminal negligence is treated in a note, 10 Am. St. R. 111. Of Criminal Negligence Blackburn, J., says in *Reg. v. Eyre*, Finlason's Report, 57 : “It is a phrase constantly used in criminal cases, but the amount of negligence that would make a man so responsible cannot be defined. It is not a little failure in duty that would make him criminally responsible ; a great failure of duty undoubtedly would. The line between the two is hard to define and must be left to a great extent in each individual case to the common sense of the jury whether or not the degree of failure of duty is criminal.”

affects the individual and the State is respectively gross negligence and criminal negligence; while it is the groundwork of reparation to the private individual, however heinous it may be, it is no more than gross negligence; so soon as it is the subject-matter in respect of which reparation is exacted by the State it becomes criminal negligence. For example, neglect to mend a road when made the subject of indictment of a public body is criminal negligence. That criminal negligence may consist in neglect of those duties which are imposed by law on various persons for the preservation of human life is due exclusively to the accident that the State does not, as a rule, intervene, except where life or limb is endangered, and leaves other injuries arising from negligence to be redressed at the suit of the individual. Criminal negligence then is negligence in such circumstances that it imposes an obligation remissible only by the State, but irremissible by the individual actually damnified by it; and since the State will not lightly intervene criminal negligence must be some "substantial thing,"¹ and not mere casual inadvertence. Between criminal negligence, however, and mere actionable negligence there is no principle of discrimination, but a question of degree only.²

Bayley, J., in *Tessymond's case*,³ seems to refer exclusively to the consequences arising from negligence to determine whether the act is a mere civil wrong or a criminal act. This can scarcely be a correct standpoint, else the omnibus driver who merely knocks a foot-passenger down and bespatters him with mud would escape any criminal consequences, while if the foot-passenger's fall were beneath the wheels of his vehicle he would be amenable to them.⁴ Whether negligence is criminal or not is referable rather to the nature of the negligent act than to its consequences—whether it is of such a nature as to be matter of public concern, or only the subject for private reparation.

Is nonfeasance
criminal?

A further point about negligence in its criminal aspect has been mooted—whether it can arise from mere nonfeasance; whether a man may be criminally convicted who has only abstained from acting. It is clear there is no legal duty on a

¹ Per Willes, J., *Regina v. Markuss*, 4 F. & F. 356.

² *Regina v. Noakes*, 4 F. & F. 920. "A fact," says Lord Erskine, C., in *Lord Melville's Case*, 29 How. St. Tr. 764, "must be established by the same evidence whether it be followed by a criminal or civil consequence; but it is a totally different question in the consideration of criminal as distinguished from civil justice how the person now on trial may be affected by the fact when so established." See per Garrow, *arguendo*, *The King v. Cator*, 4 Esp. 117, 136; and the ruling of Hotham, B., 144; also per Lawrence, J., *Rex v. Stone*, 25 How. St. Tr. 1314. See 29 L. J. Newsp. 233, an article, "Thy Duty to thy Neighbour."

³ 1 Lewin, C. C. 169.

⁴ Cp. *Regina v. Bull*, 2 F. & F., 201; and the note to *Rich v. Pierpont*, 3 F. & F. 41.

man seeing another in the water drowning to plunge in and rescue him ; nor yet on a passer-by seeing a child under the feet of a horse to pull him out and prevent his being run over ; while there is a plain legal duty on a pointsman to turn on the switches at the approach of a train, and on a parent to provide food for an infant child. While in *Reg. v. Barrett*,¹ *Wightman, J.*, may be cited as an authority for the proposition that mere nonfeasance will not constitute criminal negligence, Lord Campbell, C.J., in *Reg. v. Lowe*, was "clearly of opinion that a man may by a neglect of duty render himself liable to be convicted of manslaughter or even of murder." In this, however, there is no contrariety ; the material consideration is whether there is a duty to act.² The pointsman who undertakes an employment, the parent who is bound to the support of his child, are equally punishable, whether they act with criminal negligence or with criminal negligence refrain from acting ; because the position each occupies binds him to a particular course of conduct from which if he refrain he is as chargeable as if he act amiss. It is otherwise with the case of a drowning man ; for with regard to him the bystander has undertaken no duty, nor has the State imposed any. The case of an officer of the Royal Humane Society, apprised that a man is about to throw himself into the water, and who, notwithstanding, makes no effort, either for prevention or rescue, so that the man is drowned, may be put, and it may be objected that here is a duty and therefore a liability. But the duty is only a contractual duty, enforceable under the contract with the Humane Society. Neither the drowning man nor the State is party thereto, or has any right thereunder ; and, as we have seen, apart from the contract, which is a matter of private concern, the State has in the case in question imposed no obligation.

Other definitions of negligence are—"Fraud imports design and purpose, negligence imports that you are acting carelessly and without that design ;"⁴ "want of diligence ;"⁵ "want or omission of care or attention ;"⁶ "want of due diligence ;"⁷ "acting carelessly ;"⁸ and, not to multiply examples, which might be done to a practically limitless extent, the definition of

Other definitions.

¹ 2 C. & K. 343.

² 3 C. & K. 123.

³ Cp. *Reg. v. Thomas Smith*, 11 Cox, C. C. 210, as to which see the remark of the editor, 1 Russell, Crimes (5th ed.), 835.

⁴ Per Fry, J., in *Kettlewell v. Watson*, 21 Ch. D. 685, 706.

⁵ Campbell on Negligence, 3.

⁶ Burrill's Law Dictionary, *sub nom.*

⁷ Bouvier's Law Dictionary, *sub nom.*

⁸ Wharton's Law Lexicon, *sub nom.* ; see also a number of definitions of negligence collected in *Osborne v. McMasters*, 12 Am. St. R. 698 and note.

Willes, J.'s,
definition
adopted.

Willes, J.,¹ which will be most frequently adopted in the following pages: "Negligence is the absence of care according to the circumstances."

Considered.

Willes, J.'s, definition, though vague, is comprehensive, and accentuates the fact of prime importance, failure in respect of which is at the root of most of the defects in the comprehensiveness of the definitions—that what is due care and caution has to be worked out in the special treatment of the various departments of negligence, and cannot be disposed of by any sweeping generalization. Against this definition it may be urged that absence of care may happen either advertently or through inadvertence. If advertent it is not negligent; and whether advertent or inadvertent, the definition does not discriminate. A moment's reflection will show this not to be so. The definition is only concerned with absence of care; and this, as it is purely a negative conception, cannot connote a positive quality—advertence. Again, the steps by which the position is attained in which "absence of care" operates, are not, primarily at any rate, regarded by the law, which will not go back to consider how circumstances originated; but deals with them only as they exist. There is, however, a distinction between absence of care in circumstances arising in the ordinary course of things, and absence of care in circumstances either intentionally or recklessly produced.² Probably, too, it is this latter class of acts which is intended when the term "wilful negligence" is used.

The merit of Willes, J.'s, definition appears when one notes that the same act may be negligent or not negligent wholly according to its circumstances; it is not the act that connotes the negligence but the circumstances; as where one sends a bank-note by post: if this is done without the authorization of the creditor, and the note is lost in the transit, the sending by post is *prima facie* negligence; if the sending by post is authorized by the creditor, the sending is not negligence.³

¹ Vaughan v. Taff Vale Railway Company, in the Exchequer Chamber, 5 H. & N. 679, at 688. This is adopted by Paxson, J., in Philadelphia v. Stinger, 78 Pa. St. 225, and repeated by the same judge, then become C.J., Ellis v. Lake Shore, &c., Railroad Company, 138 Pa. St. 506, 21 Am. St. R. 914. To the same effect is Agnew, J., in Philadelphia Railway Company v. Spearen, 47 Pa. St. 300, at 305: "There is no absolute rule to cover all cases of negligence. That which is negligence in one case, by a change of circumstances will become ordinary care in another, or gross negligence in a third. It is a relative term depending upon the circumstances, and therefore is always a question for the jury, but guided by proper instructions from the Court." Also Sterrett, J., Pennsylvania Railroad Company v. Coon, 111 Pa. St. 430, 440; and Davis, J., Milwaukee Railroad Company v. Arms, 91 U.S. (1 Otto) 489, 494.

² Mercer v. Corbin, 10 Am. St. R. 716, recklessness and wanton disregard of human life will import not negligence merely but malice and criminal intent.

³ Laurent, Principes de Droit Civil, vol. xx. § 469. The sort of considerations applicable are well pointed out by Lord Esher, M.R. The Queen v. Commissioners for Special Purposes of the Income Tax, 21 Q. B. Div. 313, 318.

In *Grand Trunk Railway Company v. Ives*,¹ again, it is very clearly pointed out that "the terms 'ordinary care,' 'reasonable prudence,' and such like terms when applied to the conduct and affairs of men have relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may, in different surroundings and circumstances, be gross negligence;" and Bramwell, B., who has forcibly stated so many legal principles, illustrates this also, by saying, in *Degg v. Midland Railway Company*:² "There is no absolute or intrinsic negligence; it is always relative to some circumstance of time, place, or person." Some words that follow are so valuable that they may appropriately be subjoined: "It seems to us there can be no action except in respect of a duty infringed, and that no man by his wrongful act can impose a duty."³

Dictum of
Bramwell, B.

Here another difficulty may be noticed; Erle, C.J., on one occasion told a jury that negligence is not to be defined, because it involves some inquiry as to the degree of care required, and that is the degree which the jury think reasonable considering all the circumstances.⁴ This view attributes too much to the province of the jury and too little to that of the judge. In some cases, indeed, there is left to the jury so much as is here indicated; where, for example, there is a dispute as to facts; or where a question of conduct submitted to them is not proved directly, but is a matter of uncertain inference.⁵ What the jury have to do is not to fix the standard of care and diligence, but to determine the bearings of the conduct in the particular case; in doing so, incidentally they draw a legal conclusion, because such conclusion is not to be disentangled from the facts.⁶ Notwithstanding this, the legal standard of diligence is a thing apart from the interpretation of a jury in any individual case, and is fixed by the law with reference to the ordinary and usual diligence which a man of ordinary sense, knowledge, and prudence is used to shew in his own affairs.⁷ Of this experience is the test; and the standard varies with the shifting of general public sentiment.⁸ Whether in any particular

Standard of
care how
determined.

¹ 144 U.S. (37 Davis), 408, 417.

² 1 H. & N. 773, at 781.

³ Cp. *Ruck v. Williams*, 3 H. & N. 308, at 318.

⁴ *Ford v. London and South-Western Railway Company*, 2 F. & F. 730, at 732.

⁵ Per Andrews, J., *Sutton v. New York Central Railway Company*, 66 N. Y. 243, 249.

⁶ *Kellogg v. New York Central Railway*, 79 N. Y. 72; *Brown v. Great Western Railway Company*, 52 L. T. 622.

⁷ Pollock (3rd ed.), *Torts*, 24. Reference may be made to Co. Litt. 155b: "The most usual trial of matters of fact is by twelve such men (*liberi et legales homines*) for *ad quæstionem facti non respondent iudices* and matters in law the judges ought to decide and discuss, for *ad quæstionem juris non respondent juratores*"; to which passage there is a very learned note by Mr. Hargrave on the function of juries and their incidental right to decide questions of law. See *post* 277 notes 1 and 3, also 306 n 4.

⁸ *Grand Trunk Railway Company v. Ives*, 144 U.S. (37 Davis) 408, 417. In *Welfare v. Brighton Railway Company*, L. R. 4 Q. B. 693, at 696, Cockburn, C.J.,

case this standard has been attained is for the jury, if the evidence will in any view allow of their saying that it has.¹ But the facts may be admitted, and may be only susceptible of the inference of liability. Then the Court will direct the jury that, if they believe the evidence, the defendant is liable.² For since there is no dispute as to facts or inferences, the only point is whether the law attaches the legal consequence of negligence to them; if it does, it is for the judge to say so.³ In the same way, if the inferences from the facts cannot, on the hypothesis most favourable to the plaintiff, attain the legal standard, the judge will take the case away from the jury. So long, however, as the dispute in the case is as to a matter of fact, the whole is for the jury. The difficulty arises in determining whether the alleged conduct of the defendant comes up to the legal standard; then it becomes the judge's duty to specify what that standard is. This he usually does by putting before the jury the various possibilities of the case, and instructing them what should be their conclusion in law in the event of their finding any one of these. To this the objection has been urged that the Court not infrequently submits the whole matter to the jury without referring them to any distinct standard. In this case, it has been pointed out,⁴ the position taken up by the Court is that, since there are no clear views of public policy applicable to the matter, a rule remains to be drawn from daily experience, and to that end the Court refers to the assistance of the jury what would be within its own province were the circumstances more familiar.⁵ Yet it will not go on doing this for ever;

says: "It is a matter of universal knowledge and experience that in a great city persons do not employ their own servants to do repairs on the roofs of their houses or buildings;" and continues: "that being a matter of universal practice and of universal and common knowledge, I think is a circumstance which the judge ought to take into account in determining whether there is evidence to go to the jury or not." See *Best on Evidence* (8th ed.), 281, chapter on Presumptions. Compare what Lord Chancellor Cottenham says as to the jurisdiction of the Court of Chancery: "I think it the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules established under different circumstances to decline to administer justice, and to enforce rights for which there is no other remedy." *Wallworth v. Holt*, 4 My. & Cr. 619, at 635.

¹ *Jackson v. Metropolitan Railway Company*, 3 App. Cas. 193.

² *Skinner v. London, Brighton, and South Coast Railway Company*, 5 Ex. 787.

³ The facts may be so clear and decided that the inference of negligence is irresistible, and in every such case it is the duty of the judge to decide; but where the facts or the inference to be drawn from them are in any degree doubtful, the only proper rule is to submit the whole matter to the jury under proper instructions. It is in this sense and with this limitation that Lord Brougham's statement in *Tobin v. Murison*, 5 Moore, P.C.C. 110, 126, is to be taken. He says: "Negligence is a question of fact, not of law, and should have been disposed of by the jury." But a jury can never say whether for example a solicitor has been negligent or not. All they can do is to find the facts; whether the facts connote negligence is a matter for the direction of the judge.

⁴ *Holmes, The Common Law*, 123.

⁵ Mr. Holmes refers to *Detroit and Milwaukee Railroad Company v. Van Steinburg*, 17 Mich. 99, 120, where Cooley, J., states the rule as follows: "It is a mistake to say, as it is sometimes said, that when the facts are undisputed the question of negligence

and, where similar circumstances are of often recurrence, the Court will formulate a standard for its guidance, embodying a rule, either by adopting the experience of former juries, or, if their decisions are indeterminate, by striking out a course of its own.

Mr. Holmes concludes his examination of the question as follows: "Facts do not often exactly repeat themselves in practice, but cases with comparatively small variations from each other do. A judge who has long sat at *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common-sense of the community in ordinary instances far better than an average jury. He should be able to lead and instruct them in detail, even where he thinks it desirable on the whole to take their opinion. Furthermore, the sphere in which he is able to rule without taking their opinion at all should be continually growing."¹ Mr. Holmes's view.

The difference between those cases where the intervention of the jury is necessary and those cases where it is dispensed with, is well brought out in the judgment of the Supreme Court of the United States in *Railroad Company v. Stout*:² "It is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of the Court and not for the decision of the jury. This is true in that class of cases where the existence of such facts comes in question, rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. If a sane man voluntarily throws himself in contact with

View of the
Supreme Court
of the United
States in *Rail-
road Company
v. Stout.*

is necessarily one of law. This is generally true only of that class of cases where a party has failed in the performance of a clear legal duty. When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inferences must either be certain or uncontrovertible, or they cannot be decided by the Court." See also Cooley, *Torts* (2nd ed.), 800-806; Wharton, *Law of Negligence*, § 420.

¹ The Common Law, 124. The distinction must be borne in mind between this gradual enlarging of the province of the judge and the claim made by Atkins, J., and refuted by North, C. J., in *Barnardiston v. Soame*, 6 How. St. Tr. 1095: "That the common law complies with the genius of the nation." "I admit," says the Chief Justice, "that the laws are fitted to the genius of the nation; but when that genius changes, the Parliament is only entrusted to judge of it, and by changing the law to make it suitable to it. But if the judges shall say it is common law because it suits with the genius of the nation, they may take upon themselves to change the whole as well as any part of it; the consequence whereof may easily be seen; I wish we had not found it by sad experience." Atkins, J.'s, claim was like that of certain more modern judges who excogitate congenial law by means of a principle resident in their breasts dubbed "public policy." But compare Hardcastle (2nd ed.), *Statutes* 197 and note *post*, to chapter on Employers' Liability Act, *sub fin.* Mr. Holmes points rather to, as it were, a change of the medium through which doctrines are seen than to any wresting the doctrines themselves into conformity with preconceived notions of expediency. See further 6 How. St. Tr. 1107, 1115.

² 17 Wall. (U.S.) 657, at 663.

a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So, if a coachdriver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an accident occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible impartial man would infer that proper care had not been used, and that negligence existed; another man, equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury.¹ If then no recovery can be had upon any view which can properly be taken of the facts established by the evidence, the case should be withdrawn from the jury.² Or if, on the other hand, a recovery would be had on any view of the facts, the jury must be directed to find for the plaintiff. Intermediate cases are the province of the jury.

Power to
nonsuit.

In England the judge at the trial of an action cannot nonsuit on counsel's opening³ without the consent of the counsel. The rule is otherwise in the United States. "It was held by this Court," says Brown, J.,⁴ "in *Oscanyan v. Arms Company*,⁵ that where it is shown by the opening statement of the plaintiff's counsel that he has no case, the Court may direct the jury to find a verdict for the defendant without going into the evidence." Lord Esher, M.R., gives as the reason for the English rule that:

¹ Any one wishing to pursue this subject further should study the judgment of Torrance, J., *Farrell v. Waterbury Horse Railroad Company*, 60 Conn. 239.

² Per Fuller, C.J., *Texas and Pacific Railway Company v. Cox*, 145 U.S. (38 Davis) 593, 606.

³ *Fletcher v. London and North Western Railway Company* (1892), 1 Q. B. 122.

⁴ *Butler v. National Home for Disabled Soldiers*, 144 U.S. (37 Davis) 64.

⁵ 103 U.S. (13 Otto) 261. Involuntary nonsuits (*eo nomine*) are not allowed in the Federal Courts. The head note in *Oscanyan's* case is, "when it is shown by the opening statement of counsel for the plaintiff that the contract on which the suit is brought is void as being either in violation of law or against public policy, the Court may direct the jury to find a verdict for the defendant."

"the opening of counsel may be incorrect in consequence of his having had wrong instructions," and Lopes, L.J., adds: "It very frequently happens that though the evidence so far as the plaintiff's solicitor knows it, is fully set out in the proofs, yet when the witnesses come into the box they give other evidence (quite truthfully) which very much alters the case in the plaintiff's favour. Moreover, when the plaintiff in such a case as the present comes to be cross-examined, evidence may be elicited which has not occurred to any one before—evidence generally, no doubt, highly detrimental to the plaintiff, but sometimes very favourable to him."

This goes to prove too much; for, admitting the validity of the argument, a judge would be not only wrong in nonsuiting without consent of counsel, but further wrong in nonsuiting on the opening with the consent of counsel whose consent might be "in consequence of his having had wrong instructions;" and yet again, assuming witnesses to have been called, wrong in nonsuiting after evidence in chief and before the plaintiff or, for the matter of that, any other principal witness "comes to be cross-examined." Probably the great American judges who are responsible for the American rule would be as "simply startled" as Kay, L.J.,¹ to realize that under their practice "a suitor may lose his cause because his counsel in his opening happens by some accident to have omitted to state or to have misstated some fact which, if proved, and the cause had gone to the jury, might have so influenced them as to induce them to decide in the suitor's favour." A verdict entered for defendant in such circumstances as Kay, L.J., depicts is, at least, as unlikely to occur with the sanction of the Supreme Court of the United States as with that of the most authoritative of English tribunals. If any such case arose, before a verdict is directed, a discussion would take place. The judge would in ordinary course point to the weak place in the opening, and would ask whether the opening statement could be materially strengthened; and counsel would have an opportunity of considering the matter, and the duty of conferring with his client upon it. If additional material matter could be presented the difficulty is obviated. If not, the American rule seems more satisfactory than the English, which may necessitate a large expenditure of time, and a huge dissemination of slander or scandal extending to the statement of the whole of the plaintiff's imagined wrongs, and, in the opinion of Lopes, L.J., some part, at least, of his cross-examination, before the judge may intervene and say

English Rule
considered.

American rule
preferable.

¹ At 124.

authoritatively that there is no possible cause of action in any view of the facts.¹

Conclusion.

If the foregoing considerations are correct, the degree of care to be observed in each case implies a standard in law with reference to which liability is to be determined, and towards a definite expression of which the law is continually tending. In all the more common relations this standard already exists. And when these occur, it is the office of the judge not to leave to the jury to fix such a degree of care as to them may seem fit, but to direct them what standard the law has seen fit to adopt in each of the states of fact which, on the materials before them, it is open to them to find. Where the law has not yet fixed, or approximated to, a standard, the function of the jury is in proportion enlarged. Yet this extension of its functions is merely provisional, till the Courts have before them sufficient material to adjust a standard to the newer development of facts, when the function of the jury becomes subject to the application of the test.

The test.

Mr. Holmes² points out that the test imposed by law is an inquiry what would be blameworthy in the man of ordinary intelligence and prudence, not making allowances for minute differences of character; but saving from liability such as are wanting in faculties deficiency in which is recognizable by all and implies an absolute inability to safeguard against the consequences of such deficiency. A blind man, for instance, is not required to see; nor an infant to know; nor a man of pronounced insanity to act at his peril. In fine, the law presumes a man to possess ordinary capacity to avoid harming his neighbours, unless a clear and manifest incapacity is shewn; and in general it

¹ The case in the Court of Appeal seems to ignore, or at any rate does not lay stress on, a distinction that will harmonize the American and English rules, and bring into working efficiency the old principles of the law in the matter of nonsuits. If in point of law it is clear the action will not lie, the judge may nonsuit. But where the question is one of fact it should be submitted to the jury unless plaintiff's counsel expressly assents to a nonsuit; mere acquiescence is not enough, Tidd, Practice, 867. In *Ward v. Mason* (1821), 9 Price 291, 294, Graham, B., is reported as follows: "The judge has certainly a right to put the party out of Court wherever the case is once resolved into a pure question of law. On the other hand it is the duty of the judge who tries the cause to leave the case, if it turns on a question of fact, to the jury. As to the acquiescence of counsel in not interposing, I do not consider that binding on them. I take the distinction to be that where the counsel for plaintiff ask to be nonsuited they cannot afterwards move to set it aside; but where the judge orders it without their concurrence, I think they are not precluded, although they do not object at the time." Per Wood, B.: "No man is obliged to submit to be nonsuited on the opinion of the judge upon the weight or sufficiency of the evidence which he brings forward to support his case." In *Edger v. Knapp*, 5 M. and G. 753, plaintiff having been nonsuited on the opening of his counsel, afterwards by affidavit showed a good cause of action not stated in the opening speech, and was allowed a new trial by the Court on the payment of costs. See *Alexander v. Barker*, 2 C. & J. 133; *Sweet v. Lee*, 3 M. & G. 452; *Davis v. Hardy*, 6 B. & C. 225; Lush's Practice by Dixen, 632; and Vin. Abr. Nonsuit.

² The Common Law, 89.

does not hold him liable for unintentional injury unless a man of ordinary intelligence and forethought would have been to blame for acting as he did.¹

But the standards of the law are external standards; and, since the law is wholly indifferent to the inner motive of an act if its external manifestation comes up to what the law requires, there is no liability, though the motive is wrong; and, again, though the motive be one which the law approves, yet, if its manifestation is not that which the law requires in the class of acts, the actor is not free from liability to the extent to which his action falls short of what should have been done.²

Conduct,
not intent,
determines
liability.

There is another side to the question that must be noted. As the duty imposed by law has reference to the man of ordinary intelligence, capacity, and prudence; so, in the absence of any intimation fixing with notice of a higher degree of care, his actions are blameless if governed by that care and caution which would be sufficient in ordinary circumstances. A man driving along a road would not be affected with a greater amount of liability because he ran over a lame or a blind man, if he had no reason to suspect one crossing the road in front of him was thus disabled. If he had knowledge of the disability his duty would be increased in consequence. Again, with regard to precautions against injuring children, a man is not entitled to regulate his duty on the assumption that he will only be brought into contact with adults; for it is one of the conditions under which he lives that children are found about the streets; and this fact must enter into his consideration. The right to the enjoyment of property is even more extensive than the exercise of the personal right of using the highway we have just been considering. Notice of the infirmity of a bystander affects us with a higher degree of care towards him than towards one not afflicted. But knowledge of the infirmity of a neighbour induces no limitation of the ordinary right of property. This is well pointed out in a Massachusetts case,³ where a man afflicted with sunstroke brought an action against the bell-ringer of a neighbouring church for damages for suffering caused by the ringing of the bell for the usual services. His action was dismissed, the Court saying: "If one's right to use his property were to depend upon the effect of the use upon a person of peculiar temperament or disposition, or upon one suffering from an uncommon disease, the

¹ *Brown v. Collins*, 53 N. H. 442, 16 Am. R. 372, and *Titus v. Bradford Railroad Company*, 136 Pa. St. 618; 20 Am. St. R. 944. "The standard of due care is the conduct of the average prudent man."

² *Holmes*, *The Common Law*, lecture iii., *Trespass and Negligence*.

³ *Rogers v. Elliot*, 146 Mass. 349; 4 Am. St. R. 316.

standard for measuring it would be so uncertain and fluctuating as to paralyse industrial enterprise. The owner of a factory containing noisy machinery with dwelling-houses all about it, might find his business lawful as to all but one of the tenants of the houses, and as to that one who dwelt no nearer than the others, it might be a nuisance. The character of his business might change from legal to illegal, or illegal to legal, with every change of tenants of an adjacent estate; or with an arrival or departure of a guest or boarder at a house near by; or even with the wakefulness or the tranquil repose of an invalid neighbour on a particular night. Legal right to the use of property cannot be left to such uncertainty. When an act is of such a nature as to extend its influence to those in the vicinity, and its legal quality depends upon the effect of that influence, it is as important that the rightfulness of it should be tried by the experience of ordinary people, as it is, in determining a question as to negligence, that the test should be the common care of persons of ordinary prudence, without regard to the peculiarities of him whose conduct is on trial."

It is difficult to draw any distinction between the two cases on principle, for almost every word in the passages just quoted applies to the case of a man walking in the street or in the exercise of any other right which brings him into contact with a multitude of people. In which case his rule of conduct must constantly fluctuate as they may be blind or lame or deaf or incompetent. The best explanation is that given by Ashurst, J., in another connection.¹ "It has been said that there is a principle of law on which this action might be maintained, namely, that where an individual sustains an injury by the neglect or default of another, the law gives him a remedy. But there is another principle of law which is more applicable to this case, that it is better that an individual should sustain an injury than that the public should suffer an inconvenience." While, however, a fluctuating rule would not be of any considerable moment to the individual, a fluctuation in the duty respecting property would strike it with a sterility most baneful to national prosperity.

Conclusion.

To conclude then, the definition of negligence is hard to express, since the developments of negligence are so multiform; still the ingredients of negligence are not doubtful.

There must be (1) a legal duty to exercise control, and (2) a failure in the exercise of the control necessary in the circumstances of any particular case. Where these two elements are found a case of negligence in law exists.

¹ Russell v. Men of Devon, 2 T. R. 667, at 673.

The duty of control being the main element for consideration, negligence may be treated by classifying it with reference to the various matters over which control must be exercised.

This may be—

I. A general duty directly arising out of the constitution of society.

II. A special duty arising from the free will, or from the exigencies of particular men or particular classes.

I. The most general relations in which a man is called on to exercise control are—

(1) Where he has the control of property.

(2) Where he personally comes into contact with others, and that either directly or through the intervention of others.

II. The special control which a man has to exercise is referable to the terms of the various species of contracts into which the circumstances of his life are the occasion of his entering.

We shall accordingly consider negligence in law under these leading divisions.

CHAPTER II.

DEGREES OF NEGLIGENCE.

THERE is no matter within the range of jurisprudence that has given rise to more controversy than that which is concerned with determining what degrees of negligence are recognised by law, and the defining them when their number is determined.

Negligence
a negative
conception

The confusion that has grown up in this regard is due in part at least to the habit of regarding negligence as a positive rather than as a negative word. The rule of law prescribes diligence, that is, the attainment of a certain standard. If the person bound to use diligence fails to attain the standard prescribed by law, he thereby becomes guilty of negligence, which is a falling short of the amount of care required, not a positive infringement of duty; from the greater frequency of conformity to the standard than of aberration from it, the degrees of aberration rather than those of conformity become most prominently noted.

The existence of negligence then postulates defect and not the presence of any positive quality—the want of what should be found and not primarily, at least, the presence of what should not be found. The positive quality is “care according to the circumstances”; and so the more logical course would be to group subjects with reference to the amount of care required in their management. On the ground of convenience only, this is not done directly; and the absence, rather than the presence, of care is the feature fixed on for discrimination. Substantially, however, the presence of care is never lost sight of; since the subject dealt with is purely a relation, and so the mention of one aspect implies the mental presence of the other aspect; and one point of view cannot be insisted on without suggesting the other as its correlative. Thus liability for a slight degree of negligence implies the duty to use a great degree of care; and the obligation to use a slight degree of care is only another aspect of immunity in cases where moderate diligence has been shewn.

There are two schemes of division presented between which the authorities on the subject have divided themselves. One that had the approbation of all the older writers¹ divided negligence into three degrees: gross neglect, said to be equivalent to the *lata culpa* of the Romans; ordinary neglect, said to correspond to their *levis culpa*; and *slight neglect*, answering to what was then all but universally received as being their third degree, *levissima culpa*. The other, which is adopted by the most recent writers² on Roman law and jurisprudence, divides negligence into two classes: *culpa levis*, the lack of such diligence as a good business man would shew in a transaction similar to that investigated, where such transaction relates to his business; and *culpa lata*, the neglecting the ordinary care that is taken by persons not specialists. Of these, the former, notwithstanding much confusion in the adjustment of the various degrees, was recognised in the English and American courts and by text-writers without question till quite recently. The latter is the outcome of investigations into the doctrine of the Roman law, the result of which is embodied in Hasse's "*Culpa des Römischen Rechts*;" the conclusions expounded in which are sought to be imported into Anglo-American law by Dr. Wharton³ and the writers who follow him.

Two schemes
of division of
negligence.

The division of negligence into three degrees was first expressly adopted in practical English law, as distinguished from law as expounded by text-writers, in the judgment of Holt, C.J., in *Coggs v. Bernard*; ⁴ and he took the division from Bracton, who, like most early text-writers, was overshadowed by the influence of the Roman law, then dominant amongst the ecclesiastics whose views have alone been transmitted to us; and had conformed his expression of the law, however the substance may have been derived, to the divisions and doctrines then in vogue amongst the teachers of the civil law. German writers on the Roman law having very generally adopted the views presented by Hasse, a number of writers have concluded that certain practical results follow in English law. Their conclusions may be presented in three propositions.

Three proposi-
tions founded
on it.

I. That "the classic Roman law, which was the law of business Rome," having been misinterpreted, on the discovery of that misinterpretation the (assumed) rule of convenience in the English law, which was suggested by what was wrongly con-

I. English law
to be con-
formed to it.

¹ Story, Bailm., § 17 and note; Sir William Jones, Bailm., 21 *et seq.*, and the older authorities there cited.

² Accepting the analysis of Hasse, *Culpa des Römischen Rechts*; Maynz, *Éléments de Droit Romain*, vol. ii. 16, n. 1; Wharton, *Negligence*, § 58 *et seq.*; Goudsmit, *Roman Law*, §§ 75, 76; Holland, *Jurisprudence*, (6th ed.), 97.

³ *Negligence*, §§ 62-69.

⁴ 1 Sm. L. C. (9th ed.) 201.

sidered to be the rule of the Roman law, should be abandoned along with the misapprehension from which it took its origin.

II. The theoretic rule of English law in practice obsolete.

III. Incompatible with practical needs.

2. That there is no need to drop the principle of three divisions of negligence, since, in practice, it does not exist.¹

3. That if this principle of division did exist it would be an inconvenience and "incompatible with the necessities of business."

These positions are now to be considered from the standpoint of English law and on the assumption that the basis of them, the proof of his position by Hasse, is conclusively made good.

I. Must English law be brought into harmony with the Roman?

As to the first of them, it may be pointed out that the common law is of independent growth from that of Rome. Roman law doctrines, assimilated in the common law, are matters of suggestion and not of legislation, dependent for their acceptance, not on the authenticity of their origin, but on their practical value in the circumstances to which they are applied. If the doctrine accepted is bad Roman law but suitable English law disproof of its authenticity in the Roman system will not affect its recognition by the English Courts. For example, when Southcote's case was overruled by the judgment in *Coggs v. Bernard*, it certainly never entered the minds of any of the judges who were parties to that judgment, that it was a matter of the slightest practical importance whether "the business jurists of Rome when at her prime" had adopted the division of bailments which was found in Bracton; but it must have been of the extremest moment to them whether their judgment embodied the current ideas of what was equitable, and was adapted to the needs of existing society.²

Maine's "Ancient Law."

That the state of Roman authority had nothing to do with the recognition by English judges of Roman doctrines absorbed into English law is curiously illustrated by a passage in Maine's "Ancient Law"³ relating to Bracton, from whom Holt, C.J., directly drew: "That an English writer of the time of Henry III. should have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the 'Corpus Juris;' and that he should have ventured on this experiment in a country where the systematic study of the Roman law was formally prescribed, will always be amongst the hopeless enigmas in the history of jurisprudence." But independently

¹ Wharton, Negligence, § 64. The exact expression is that, "while it" (the theory of three degrees of negligence) "lingers still in English and American text-writers, it is practically dropped by our Courts": § 58 (3).

² See Austin, Lectures on Jurisprudence (3rd ed.), vol. ii. 655.

³ (7th ed.) at 82.

of this, the authority of Selden, in his Dissertation annexed to *Selden's Dissertation to Fleta*, may be vouched to prove that the civil law as civil law, and apart from any considered applicability of its doctrines to national use, had not "by public sanction any force, any more than the passages out of Plato, Aristotle, Demosthenes, Cicero, Seneca, Plutarch, and such authors here and there frequently quoted by the French lawyers."¹

It must also be borne in mind what Bracton's purpose was—to lay down the *English* law for English judges, and to teach *qualiter et quo ordine lites decidantur secundum leges et consuetudines Anglicanas*; which he effected, not by means of reference to authorities of Roman law, but to *facta et casus qui quotidie emergunt et eveniunt in regno Angliæ*; or, as the point is put by Prof. Güterbock:² "The reader, instead of getting the impression that sometimes domestic and sometimes foreign materials are presented to him, finds before him the picture of an indivisible homogeneous whole, in which the Roman elements are no longer merely Roman law, but have become integral parts of the *leges et consuetudines Anglicanæ*." If that were so at the outset, the force of the consideration is infinitely increased after the principle, true or false, has for nearly two centuries been recognised as of binding force in our law. Better might it be argued that the provisions of the Prussian Code (avowedly an outcome of the Roman system), in which there are three degrees of negligence specified—grave, ordinary, and slight (*ein grobes, mässiges, geringes Versehen*)³—are abrogated by the results of the researches of antiquaries. Such a contention, that legislative law should depend for its validity upon the results of historical inquiry subsequent to its enactment, is a patent absurdity; and no less so is the assumption that English judge-made or customary law should be affected by the most learned historical investigations of jurists engaged on the interpretation of a foreign system.

The second position is, that while the rule of the three degrees of negligence survives, through the conservative tendencies or want of research of text-writers, "it is practically dropped by our Courts."⁴

This is a matter easily tested. In the well-known case of *Readhead v. Midland Railway Company*,⁵ the Court of Queen's Bench (Blackburn, J., dissenting) held the defendants not liable

¹ Chap. ix. § i. "Our nation never admitted the imperial law into the public, called the civil, government, whatever effect the use of that law, such as it was, might have had among us during the before-mentioned interval."

² Bracton and his Relations to the English Law, 58.

³ P. i. tit. 3, §§ 18, 22

⁴ Wharton, Negligence, §§ 58, 64.

⁵ L. R. 2 Q. B. 412, L. R. 4 Q. B. 379.

Selden's
Dissertation
to Fleta.

Bracton's
purpose.

Prof. Güter-
bock on the
Roman
elements in
early English
law.

II. What is
the existing
practice of
the Courts.

Rule in
contract—
Readhead v.
Midland
Railway
Company.

for an accident caused by the breaking of the tyre of a wheel of a carriage in which the plaintiff rode, as there is no warranty by a carrier of passengers that his carriage is absolutely road-worthy, and as the defendants had used all diligence in providing a safe carriage and examining it both before starting and in the course of the journey. The plaintiff appealed. In the result the Exchequer Chamber laid down the principle of law applicable to be that "due care undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. But the duty to take due care, however widely construed, or however rigorously enforced, will not, as the present action seeks to do, subject the defendants to the plain injustice of being compelled by the law to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use, which no human skill or care could either have prevented or detected."¹ In the Irish case of *Burns v. Cork and Bandon Railway Company*,² the obligation of a carrier of passengers is stated to be that of warranting "that the vehicle in which he conveys them is at the time of the commencement of the journey free from all defects, at least so far as human care and foresight can provide, and perfectly road-worthy." Again, in *Christie v. Griggs*,³ Sir James Mansfield, C.J., expresses the same in almost the same words, stating the obligation as one that, "as far as human care and foresight could go, he would provide for their safe conveyance." These are cases where the right of action arises on a contract.⁴

*Burns v. Cork
and Bandon
Railway
Company.*

*Christie v.
Griggs.*

Rule in tort—
*Weaver v.
Ward.*

In regard to tort the case is simpler. The judges in *Weaver v. Ward*⁵ express the law: "No man shall be excused of a trespass . . . except it may be judged *utterly* without his fault." And this is exemplified in the famous judgment of Blackburn, J., in *Fletcher v. Rylands*:⁶ "The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose

¹ L. R. 4 Q. B. 379, at 393.

² 13 Ir. C. L. R. 543, at 546. See too *Francis v. Cockrell*, L. R. 5 Q. B. 501.

³ 2 Camp. 79, 81.

⁴ The rule of the Roman law is, where a contract is for the interest of both parties, though their interests may be adverse, *In contractibus bonæ fidei servatur ut si quidem utriusque contrahentis commodum versetur, etiam culpa, sin unius solius, dolus malus tantum modo præstetur*, D. 30, 108, 12. Where it is for the benefit of one, *Is qui utendum accepit exactam diligentiam custodiæ rei præstare jubetur*, Ins. 3, 14, 2; while in the other case, *Quin etiam paulo remissius circa interpretationem doli mali debere nos versari, quoniam nulli utilitas commodantis interveniat*, D. 47, 2, 62, § 6.

⁵ Hob. 134.

⁶ L. R. 1 Ex. 265, at 280.

cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own: and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property."

In *Readhead v. Midland Railway Company*,¹ we see that the requirement is to exercise "all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order." The standard must, *prima facie*, be alike for all. *Spondet peritiam artis*; and the *peritia* is that of the age and country and circumstances in which it is demanded. But this being granted, even within these limits different degrees are demanded. Thus, where one man took another in his carriage with him gratuitously, without examining the bolts and fastenings of his carriage (which, however, were examined every three months by a blacksmith), and during the journey an accident happened, the failure to examine the vehicle was held not to be negligence sufficient to charge the owner of the carriage.² Again, where a railway company made an examination of a truck, but not sufficient to discover a crack in an axle, through which an accident subsequently happened, and which a jury found "might have been discovered by a sufficiently minute examination," the Court held the company not liable; since they were not bound in the circumstances to "an examination of a very minute character," "but certain precautions were taken by the workmen employed on this duty which are usually taken by railway companies in such cases, and are generally found by experience to be sufficient."³ Yet once more, where a person hired a carriage, a pair of horses, and a driver from a jobmaster, and, by reason of a bolt in the under part of the carriage breaking, the splinter-bar became displaced, the horses started off, the carriage was upset, and the hirer injured, the Court held that the jobmaster's duty was "to supply a carriage as fit for the purpose for which it is hired as care and skill can render it."⁴

Rule in contract discussed.

Now, to compare these cases—all modern and of authority—Comparison of degree of duty exacted. with the new test suggested. In the first place, they are all three included under that heading, called *culpa levis*, which

¹ L. R. 4 Q. B. 379, at 393.

² *Moffatt v. Bateman*, L. R. 3 P. C. 115.

³ *Richardson v. Great Eastern Railway Company*, 1 C. P. Div. 342.

⁴ *Hyman v. Nye*, 6 Q. B. D. 685. Cp. *Ingalls v. Bills*, 50 Mass. 1.

signifies "the lack of such diligence as a good business man would shew in a transaction similar to that investigated, such transaction relating to his business." They are cases arising out of matter in the nature of contracts; they relate to the safety of persons conveyed by the defendants; and they depend upon the amount of care exercised. Yet in the one case the care is sufficient that submits the vehicle once in three months to a blacksmith. In the second case an examination of the defective vehicle was made; and though it was not minute enough to discover the defect which caused the accident (which yet might have been discovered), still the examination was held to satisfy legal requirements. In the third case nothing less than the minute examination which was held not necessary in the second case was required. To quote Dr. Wharton,¹ "it must be again remembered that the test is that of the *good*, not of the *perfect*, man of business; and this, as has already been shewn, because, among other reasons, no perfect business man exists." But the precise difference between the second and third cases is the difference between the *good* and the *perfect* man of business, as expounded in the very passage beginning with the quotation just cited. The decision of the Court in the second case was that the defendants had used the precautions "which are usually taken by railway companies in such cases, and are generally found by experience to be sufficient"; or, to follow the words of Dr. Wharton, had adopted "all improvements which, when tested by experience, seem likely to add to the security of those entrusted to his care, provided that such improvements can be applied without, by their cumbrousness or expense, impeding the transportation which such persons desire." In the third case the duty was to supply an article as fit as care and skill could render it without any qualification whatever. If, then, either of these was the care of the "good man," the other must be different, either more or less; certainly not the same. Now the diligence required in the third case, namely, to make the carriage "as fit and proper as care and skill can make it,"² is precisely Dr. Wharton's *diligentia diligentissimi*, "the utmost diligence."³ Further, in the first case cited⁴ the diligence required was also the diligence of the specialist—it was found that "the carriage was regularly examined by a blacksmith every three months,"

¹ Negligence, § 635.

² Per Lindley, J.: "The expression 'reasonably fit' denotes something short of absolutely fit; but in a case of this description the difference between the two expressions is not great": *Hyman v. Nye*, 6 Q. B. D. 685, at 688.

³ Negligence, § 636.

⁴ *Moffatt v. Bateman*, L. R. 3 P. C. 115.

and this was held sufficient. Yet obviously much less care was used than in the second or third cases; still it was enough; since a different standard was resorted to in each.

To approach the subject from the side of negligence arising from tort—the same requirement of a diligence exceeding that of the mere good and diligent man is found not infrequently to be exacted. A master orders his servant to lay down a quantity of rubbish near his neighbour's wall, though so as not to touch the wall. "The servant, by extraordinary care, might have prevented the rubbish touching the plaintiff's wall." "The servant used ordinary care in the course of executing the master's order, and, notwithstanding that, the rubbish ran against the wall." The master is held liable as a trespasser.¹ Again, a contractor is employed by a local board to construct a sewer under a highway, in the course of which he digs a trench, which is afterwards filled in with earth, and the roadway apparently made good. The work is done under the directions and to the satisfaction of the surveyor of the defendants, who inspects the road for three months at the risk of the contractor, till, being in a satisfactory state, it is handed over to the local board. The surveyor continues to inspect and to pass over the road up to the time of the accident, eight months later, when, as the plaintiff's horse drawing a spring cart is going along the road, its fore feet suddenly sink through a coating or crust of macadam into a cavity. Neither the engineer nor the surveyor can account for the existence of the cavity. Yet the local board is found guilty of negligence.² Or to take a different class of actions: a person keeping an animal whose nature is to do mischief, with knowledge of its propensities, is liable for any damage done by it, "since negligence is presumed without express averment."³ In each of these cases the standard of diligence is far higher than any that could be required of an ordinarily prudent and careful man. In the first, the facts shew that this standard was actually attained; yet the act of the servant doing a thing in itself lawful, and with care adequate to the rule of ordinary diligence, is held to affect the master with liability. In the second, though ordinary skill is exerted, the defendants are held liable for what they can neither discover nor explain. In the third, negligence is presumed without any fault *dans locum injuriæ*, and though the keeping of a monkey is not illegal. Neither of these cases seems to fall short even of that infinitesimal negligence which

Rule in tort discussed.

¹ Gregory v. Piper, 9 B. & C. 591.

² Smith v. West Derby Local Board, 3 C. P. D. 423.

³ May v. Burdett, 9 Q. B. 101.

Dr. Wharton regards as an impossible standard—and certainly none of them falls *below* the test that Sir William Jones lays down—the omission of that care which very attentive and vigilant persons take of their own goods, or, in other words, of very exact diligence.¹

III. To exact
a minute
diligence is
impracticable.

Thirdly, it is said that if the principle of division of negligence into three degrees did exist, the degree of *culpa levissima* would be an inconvenience, “and incompatible with the necessities of business.”

Argument that
no person can
be habitually
diligentissimus
examined.

Wharton,² summarizing Hasse,³ asks where is the *diligentissimus* or *exactissimus* to be found who is to be taken as the standard by which the *diligentia diligentissimi*, with its antithesis of *culpa levissima*, is to be gauged. “This question is put,” says he, “by Le Brun, without any reply from his astute antagonists; and it is repeated by Hasse with the confident assertion that the search is one that will be made in vain.” Possibly Le Brun’s “astute antagonists”—Pothier was one—while quite ready to admit the search would be unproductive, did not think it expedient to let the controversy wander into so devious a bypath, since their contention was not based on a question of *diligentia in concreto*, a standard dependent on the existence of any particular man, but of a *diligentia in abstracto*, a standard to which, though none might habitually attain, all must in particular cases conform.⁴ Had they felt inclined for such futile inquiries, they might with equal readiness have issued a retaliatory challenge for a “good specialist” who never makes a mistake. The true answer to either challenge is that the law does not in either case contemplate such. The standard of conduct is not that of any man, however excellent, but the average conduct of men in the community or class or calling, and in the circumstances, of him whose conduct in the instance in point may happen to be arraigned, though no individual man has ever habitually attained it. The reference is not made to a course of diligence, but to a point of diligence—diligence in the particular phase of the matter as to

¹ Bailm., § 22.

² Negligence, § 65.

³ *Culpa des Römischen Rechts*.

⁴ This may be illustrated by a passage from Lady Holland’s *Life of the Rev. Sydney Smith*, “It requires a long apprenticeship to speak well in the House of Commons. It is the most formidable ordeal in the world. Few men have succeeded who entered it late in life; Jeffrey is perhaps the best exception. Bobus used to say that there was more sense and good taste in the whole House, than in any one individual of which it was composed,” vol. i. 347. So too, the taste in literature or art of a class may be more correct than that of any writer or performer—*e.g.*, the taste in architecture at the present day formed on the models of bygone times. What incongruity, then, in fixing a standard of conduct in certain emergencies higher than the habitual practice of the individual? For a development of the same idea see chap. vii., *On the Moral Perfection of Jesus, in Phases of Faith*, by F. W. Newman, at once a scholar, a man of powerful and original mind, and a logician.

which inquiry is being made. That even Cæsar, to quote an example of Hasse's drawn from the discussions of the schoolmen and cited with approbation by Dr. Wharton,¹ "sometimes yielded to a *negligentia* which was not merely *levis* but *lata*," and was therefore not up to the mark of the standard of the mythical *diligentissimus*, is a good reason why Cæsar in the cases of his shortcoming should be held liable, though none that other less happily endued persons should be allowed to be guilty of *negligentia* either *levis* or *lata*; nor that they should be allowed immunity for *culpa levissima* in the sense imposed by English authority—of very exact diligence.²

Hasse's
illustrations of
Cæsar's
diligence
considered.

The citation of any such instance as that of Cæsar tends rather to lead astray from the point than to clear it. The theory of negligence has nothing at all to do with Cæsar's "intense sensibility during a crisis to impending dangers, his incomparable fertility in expedients, and his almost preternatural coolness, promptness, and intrepidity in applying the right remedy at the right moment to the right thing."³ It demands care according to the circumstances; and the sole question is whether this care, which in the cases of most frequent occurrence is that to be looked for from men of ordinary skill in the matter in hand, is in all cases adequate, or whether in certain circumstances the law does not demand an exceptional attention which cannot justly be described as that which a good business man would shew in a transaction similar to that investigated. To say that "no one more diligent than Cæsar could be found"—a very questionable assertion even in the narrowest sense—may be an eminently interesting piece of historical information, but has not the remotest bearing on the point which the proposition is advanced to prove; since the only relevant proposition—that Cæsar is not liable for negligence when he is negligent, because he is Cæsar—is too obviously untrue (under the law of England) to need examination.

The infirmities in this reasoning about the impossibility of *culpa levissima* are numerous. To pick out a few—

First, it is assumed that, because "there is no continuous duty which we can engage in without being justly chargeable at some time or other during its discharge with this *culpa levissima*," the thing does not exist.⁴ Now *culpa levissima* is only alleged to indicate a special degree of negligence applicable in exceptional

Culpa levissima
does not imply
a continuous
duty.

¹ Negligence, § 65.

² Jones, Bailm., 22.

³ Wharton, Negligence, § 65. This "eloquent" writing calls to mind an anecdote of Charles V., who, being shewn the tomb of some French knight bearing an inscription announcing the entombed hero as the bravest of the brave, who never knew fear, observed, "Then he could never have snuffed a candle with his fingers."

⁴ Wharton, Negligence, § 66.

cases and of rare occurrence ; yet the argument directed against it assumes that it is a condition of life. The position is this :— In certain crises A may be placed in such a position with regard to B that exceptional care may be required of him ; just as at other times he may be so placed that a lesser degree of care than usual—Hasse's common or ordinary care—may alone be required ; with the usual relations of A and B may be those calling for "expert diligence." As, then, the fact that the normal relations requiring "expert diligence" does not exclude the possibility of a special relationship in which non-expert diligence is necessary, in like manner (assuming that the law ever postulates more than "expert diligence") no reason is apparent why special relations should not be raised requiring more than ordinary "expert diligence."

If it does, this does not negative an objection to exercise it.

Secondly, even if the duty required is "continuous," it does not follow from that that the law the less exacts it.¹ As Dr. Wharton observes, "the human mind, from its limitedness of vision, is incapable of perfect diligence. In certain periods of great excitement such diligence may, for a time, be approached. But, in any continuous work, such intense diligence is intermittent, and, when the intermission comes, there is *negligentia levissima*." If that is *negligentia levissima*, it is clearly actionable. Take a not unprecedented case—a pointsman outside a large station, with trains constantly passing requiring "intense diligence," lapses for a moment, closes the wrong points, runs a train on a wrong line, and causes an accident. The company is liable for the consequence of the pointsman's lapse. To this it may be answered, the negligence is the negligence of the company in leaving one to do the work of two ; but it is also that of the man himself, who may have discharged the duties perfectly for ten years, and faltered only for two seconds, and for this an action lies against him as a wrongdoer.

Argument of the "impracticability of such a superlative standard."

Thirdly, the reasoning is inverted, and it is said that if the managers of enterprises of any importance were to be held responsible for *culpa levissima*, such enterprises would not be undertaken ; if *culpa levissima* existed, its subject-matter would cease to exist. The proof of this, in Dr. Wharton's words, is, "Have we not illustrated the impracticability of a such a superlative standard of diligence by the fact that our Anglo-American

¹ In this connection, Dr. Wharton says, "*Magnus Apollo dormitat*"—a reminiscence, probably, of Horace's "*Indignor quandoque bonus dormitat Homerus*." The next line better illustrates the doctor's point : "*Verum opere in longo fas est obrepere somnum*." But this is not good law ; else evidence of character would be admissible in reduction of damages for negligence, as it seems to be in the matter of bad verses : see Dacier's Horace, De Aate Poeticâ, note on the above verses.

common carrier's liability for insurance of goods is now, with the approval of the Courts, almost universally excepted away?" Admitting the fact, the conclusion does not follow; that the law will not disregard a contract when made is quite a different thing from an antecedent approval of the terms of it. And the fact that the law approves an excepting of the common carrier's liability in contract for goods will not affect the duty of a railway company to guard against personal injury.¹ In England, at least, guarding oneself by bearing in mind that the contracts of persons are, as far as possible without injury to State policy, to be observed, the tendency is not as alleged,² nor yet—to continue the inquiry as far as possible—it would seem, in Dr. Wharton's own State of Pennsylvania.³

Fourthly, once more to draw from Dr. Wharton,⁴ it is said, that though occasionally judges speak of *culpa levissima*, "when this is done it is generally with qualifications to shew that the *culpa levissima* in question is simply the *culpa levis* of the business Roman jurists—that negligence which a man, who specially undertakes a particular business, shews either in the inadequate preparation for, or the inadequate management of, such business." In proof of this he cites the Massachusetts case of *Ingalls v. Bills*,⁵ where the Court, after laying down the proposition that carriers of passengers are bound to use the utmost care and diligence in providing against those injuries which human care and foresight can guard against, continues: "But if the injury arose from some invisible defect which no ordinary test will disclose, like that in the present case, the carrier is not liable." From this Dr. Wharton argues: "The *culpa levissima*, therefore, of the theorist subsides into *culpa levis* when applied to practical life."

Argument that *culpa levissima* is indistinguishable from *culpa levis*.

Reverting to the three cases put in an earlier stage of this discussion,⁶ the specialist may apply "an ordinary test" to his vehicle once in three months, and for some purposes it will be enough. For others he may be bound to make an ordinary examination previous to each journey. For others again, and of these is the case in point, he does not satisfy what is required of him unless he thoroughly overhauls his vehicle previously to every journey, and discovers all defects which an ordinary test may dis-

¹ As to the high standard of care required of railway and gas companies in America, see Shearman and Redfield, *Negligence*, §§ 41-51.

² *Great Western Railway Company v. Bunch*, 13 App. Cas. 31, commenting upon *Bergheim v. Great Eastern Railway Company*, 3 C. P. Div. 221.

³ *Grogan v. Adams Express Company*, 114 Pa. St. 523. *Liverpool, &c. Steamship Company v. Phoenix Insurance Company*, 129 U.S. (22 Davis) 397 at 439, per Gray, J. *Indianapolis Railroad Company v. Horst*, 93 U.S. (3 Otto) 291.

⁴ *Negligence*, § 636.

⁵ 50 Mass. 1.

⁶ *Ante*, 25.

close. The test in each case is the same; its application varies in strictness with the degree of the duty. The law may say that neglect of the highest duty is *culpa levis*; though it can scarcely say that the degree of care, in the use of the test upon similar subject-matter in cases like *Ingalls v. Bills*¹ and in *Richardson v. Great Eastern Railway Company*,² is the same; since absence of liability in the one case was consistent with the existence of a crack "that, having reached the surface, might have been discovered by a sufficiently minute examination"; while in the other, it was necessary, in order to prevent liability attaching, that the injury should arise from "some invisible defect which no ordinary test will disclose."

Lord Fitzgerald in
Hughes v. Percival.

That the law, in some cases, requires more than the care of the Roman *paterfamilias*, or, in very many, requires less, follows from what is said by Lord Fitzgerald, in the House of Lords, in *Hughes v. Percival*,³ where the cause of action arose through want of care in carrying out certain building operations involving cutting into a party wall. "What," says that learned lord, "was the defendant's duty? The law has been verging somewhat in the direction of treating parties engaged in such an operation as the defendant's as insurers of their neighbours, or warranting them against injury. It has not, however, reached quite to that point. It does declare that under such a state of circumstances it was the duty of the defendant to have used every reasonable precaution that care and skill might suggest in the execution of his works, so as to protect his neighbours from injury, and that he cannot get rid of the responsibility thus cast on him by transferring that duty to another. He is not in the actual position of being responsible for injury, no matter how occasioned, but he must be vigilant and careful, for he is liable for injuries to his neighbour caused by any want of prudence or precaution, even though it may be *culpa levissima*." In this, at least, there are no "qualifications to shew that the *culpa levissima* in question is simply the *culpa levis* of the business Roman jurists."⁴

Argument
that the
standard is
an impossible
one.

Fifthly. It is assumed that *culpa levissima* implies a failure of some species of transcendent and impossible diligence. In fact, the fallacy is perpetrated of treating *culpa levis* and *culpa lata* as

¹ 50 Mass. 1.

² 1 C. P. Div. 341. Cp. *Meier v. Pennsylvania Railway Company*, 64 Pa. St. 225.

³ 8 App. Cas. 443, at 455.

⁴ *Mackintosh v. Mackintosh* (1864), 2 Macph. 1357, is cited as deciding in Scotland that the only degrees of negligence which the law recognises, are *culpa lata* and *culpa levis*, and that the distinction between *culpa levis* and *culpa levissima* is not well founded. A reference to the case will show that this statement is a mere adoption of Lord Mackenzie's statement in his *Roman Law*, 186, and that this is a summary of the position taken up by Hasse, and in neither case the result of independent opinion.

relative terms, while *culpa levissima* is taken to imply an absolute standard—the highest degree of care and diligence the human mind can conceive of. This is manifestly absurd, and inconsistent with any definition of *culpa levissima* given for any other purpose than to refute its existence.¹ *Qui enim eam non adhibent diligentiam quam solent patresfamilias ad rem attentissimi, culpam levissimam; qui ommittunt diligentiam, a frugi patre familias adhiberi solitam, levem; qui, denique, ne eā quidem diligentia, qua omnes, etiam dissoluti homines, uti solent, utuntur, latam committere dicuntur.*² If *culpa levis* is negligence arising from the lack of such diligence as the average business man would show, then *culpa levissima*, as contrasted with it, is a failure of compliance with some severer standard not necessarily specified save by reference to the *culpa levis*. Or again, if *culpa levissima* marks shortcomings in very exact diligence, then *culpa levis* is failure to reach the accustomed standard.³

¹ *Levissimam scilicet culpam de eo qui summam diligentiam deberet nec eam præstitit (sic) sed mediocrem tantum: Lexicon Juridicum, (1593) sub voce Culpa.* In this article five species of negligence are enumerated, and it is added *nam non solum tres aut quinque sed infinitos culpæ gradus significant Imperatores.* Sir William Jones, Bailm. 22, 118.

² Story, Bailm. § 18, citing Heinec, Elem. Jur. Inst. lib. 3, tit. 14, § 787; which, however, is not the passage in the text, though to the same effect. Compare Heinec, Pars. 3, Pandectar, lib. 13, § 116. *Culpæ enim infiniti gradus esse possunt.*

³ Since the doctrines of the English law are unaffected by historical discoveries in the civil law, any prolonged consideration of the conclusions of its professors would be not only unnecessary, but irrelevant, in the present treatise. The view put forward in the text, however, requires some reference to the controversy in the Roman law. The argument of Hesse is summarised by Prof. Maynz in his *Éléments de Droit Romain*, vol. ii. 17, and may be shortly noticed. First, the term *culpa levissima* it is said, is only found in a fragment in Ulpian, and there has no technical signification. The passage alluded to is D. 9, 2, 44, p., *In lege Aquilia et levissima culpa venit.* Secondly, since *culpa levis* is the want of care of a man essentially attentive and careful, *culpa levissima* must mean more than this; but the Roman law nowhere requires a higher degree of diligence than that of a good father of a family—that is, of a man essentially careful and attentive. Thirdly, the Roman law never mentions any other degree than *culpa levis* when it requires to discriminate between *casus* and *culpa lata*. Fourthly, the argument from the use of the term *exactissima diligentia* in the civil law—e.g., I. iii. 27, 1; D. 17, 2, 72; D. 44, 7, 1, § 4—to the existence of its correlative, *levissima culpa*, is invalid, since the passages have no technical signification. Fifthly, that to require a greater degree of care than that of a good father of a family would be inequitable.

Summary of conclusions of Roman law writers.

To this it may be urged that whether the fragment from Ulpian has any technical signification or not, it yet is the expression of an exceptional fact that under the *lex Aquilia*, as a general rule, the mere existence of *culpa* in its slightest form raises the presumption of liability (see Maynz, vol. ii. § 260 at 16); whereas in other branches of law this is not necessarily so. To this the reply is that, there being so strict a rule in regard to the *lex Aquilia*, there is neither *culpa lata* nor *culpa levis* under it, and therefore degrees do not apply. But the degrees of diligence to which we are bound ought to be determined by reference to ourselves, not with regard to any one external object, one degree being owed to one thing, another to another, and the highest degree to a third; and if a higher degree is habitually required in cases that come under the *lex Aquilia* than is habitually applied in contracts, this rather argues that the degrees exist than the contrary.

In the Greek translation in the Basilica of the passage in the *lex Aquilia*, which mentions *culpa levissima*, the word used, says Sir William Jones (Law of Bailments, 33), is *ῥαθυμία* (60, 3, 5), while the word corresponding to *culpa levis* is *ἀμέλεια*. Now this is very nearly a *contemporanea expositio*; for though the Digest was published A.D. 533 and the Basilica not till A.D. 884, still this code was merely a collection

The Roman law writers' division not one into degrees, but into kinds.

The division of negligence into *culpa levis*—designating the lack of such diligence as a good business man would shew in a transaction similar to that investigated where such transaction relates to his business—and *culpa lata*—designating the neglect of the ordinary care that is taken by persons not specialists, is not a division, properly speaking, of degrees of negligence, but

of those translations of the Roman law which had been long in actual use in the courts of law, and were received by the legal schools as authoritative (Finlay, History of the Byzantine and Greek Empires, vol. ii. 287), while the earliest of the scholastic commentators, Accursius, was three centuries later (1182–1260).

It is true that the explanation of such a passage as that relating to the diligence of the *negotiorum gestor*, I. iii. 27, 1, *ad exactissimam quisque diligentiam compellitur reddere rationem; nec sufficit talem diligentiam adhibere qualem suis rebus adhibere soleret, si modo alius diligentior commodius administraturus esset negotia*, is that the *diligentia diligentis et studiosi patris familias* marks the rule *exactissimæ diligentia*, and that *diligentia quam suis rebus adhibere solet* is an individual exception which, being dependent on the personal circumstances that call for its application, does not come under any rule but that of the particular instance; and this seems to be so. The same holds good as to the rule under the title *Pro Socio*, D. 17, 2, 72: *Culpa autem non ad exactissimam diligentiam dirigenda est; sufficit enim talem diligentiam communibus rebus adhibere qualem suis rebus adhibere solet quia qui parum diligentem sibi socium acquirit, de se queri debet*. The same meaning is not equally clear in the title *De Obligationibus*, D. 44, 7, 1, § 4: *Is vero qui utendum accepit, si majore casu cui humana infirmitas resistere non potest (veluti incendio ruina, naufragio) rem quam accepit, amiserit securus est. Alias tamen exactissimam diligentiam custodiendæ rei præstare compellitur; nec sufficit ei eandem diligentiam adhibere quam suis rebus adhibet si alius diligentior custodire poterit. Sed et in majoribus casibus si culpa ejus interveniat tenetur; veluti si quasi amicos ad cœnam invitaturus argentum quod in eam rem utendum acceperit, peregre proficiscens secum portare voluerit, et id aut naufragio aut prædonum hostiumve incursu amiserit*. The liability in this last case is similar to the liability in the English law of trespass as illustrated in *Rylands v. Fletcher*. Although in the matter in question there has been no negligence, yet in an earlier stage there has been fault, and hence liability. But the principle involved in the requirement of *exactissima diligentia* is the absolute highest standard to be found—*si alius diligentior custodire poterit*. If, then, this is the *diligentia* of the *diligens et studiosus paterfamilias*, then the *levis culpa*, the normal standard of the Roman is the same as the *levissima culpa* of Sir William Jones and the other English and American authorities—the omission of that care which very attentive and vigilant persons take of their own goods. It is hard to suppose that in practical business the standard was kept up to this superlative standard. That a large dispensing power was available to remit the rigorous application of the test *Si alius diligentior custodire poterit*, is indicated by Dr. Wharton, Law of Negligence, § 53. See Hasse, 133, who quotes a test of a duty to perform a journey *quo plerique ejusdem conditionis homines solent pervenire*. The result is that in the civil law *lata culpa* marks *nimia negligentia id est non intelligere quod omnes intelligunt* (D. 50, 60, 213, § 2); *culpa levis* or *culpa* merely (for, when *culpa* only is mentioned, *culpa levis* is intended to be signified: Taylor Civil Law (4th ed.), 174 is the *culpa* which exists when a person bound to a special duty neglects to enter upon and discharge it with the diligence belonging to a *diligens bonus studiosus paterfamilias, qui sobrie et non sine exacta diligentia rem suam administrat* (Wharton, Law of Negligence, § 30), and *homo diligens est et studiosus paterfamilias cujus personam incredibile est in aliquo erasse* D. 22, 3, 25. But there are two tests of this diligence—(1) *Si alius diligentior custodire poterit*: (2) *Quo plerique ejusdem conditionis homines solent pervenire*.

Further, in the *lex Aquilia*, which was the general remedy of the Roman law for positive damage (*damnum corpore corpori datum*), *la plus légère faute suffit déjà pour nous rendre responsable du dommage qui en a été la suite*; but the most authoritative commentators on the Roman law consider this to be comprehended in the term *culpa levis*. There is a notable syllogism of Donellus which illustrates this: *Quorum definitiones eadem sunt, ea inter se sunt eadem; levis autem culpæ et levissimæ una et eadem definitio est; utraque igitur culpa eadem*. Yet the distinction between the highest diligence of the specialist and the ordinary diligence of the specialist could not fail sometimes in judicial proceedings to need discrimination; and the two tests above mentioned enable this to be done. The latter stages of the law distinguished two different things by different names, which in the Digest are comprehended under one

Discussed.

rather of kinds.¹ Between the negligence which does not know what all know, and does not see what all see,² and the negligence of a business man in his speciality, there is an intrinsic difference, and not a mere difference in degree. In other words, there is an impassable barrier forbidding a transfer from one of these classes to the other by the mere addition or subtraction of the quality of care. The *differentia* of the classes is possession of special knowledge or acquired skill. The possession of this may not be necessary to rank any person with those who are under the necessity of shewing care conjoined with knowledge; since one may estop himself from denying the possession of the knowledge that his conduct represents him to possess, and then, though he has not, he becomes bound as though he had. The standard of the one class presupposes special knowledge; the standard of the other presupposes the absence of special knowledge. Now the highest degree of care and caution does not bridge the interval between what is required of the specialist from what is required of the non-specialist. For example, a dangerous surgical operation is to be performed by a specialist. The question of the care or want of care in the conduct of it is based on a special knowledge of the mechanical means of carrying out the operation needed, and an acquired skill in the use of those means. One not a medical man is invited to undertake it. Even if the circumstances bound him to a perfect care in the conduct of the operation, he would not rise to the level of the diligence of the specialist, though the care he might be bound to exercise might be tenfold that which the specialist would be expected to afford. For in the specialist's case there would be required the additional factor of special knowledge. Thus, though the non-specialist might exercise unfailing care, he would not be on the same plane with the specialist, whose efficiency would be determined by two factors—knowledge and care guided by knowledge, as against care merely unrelated to knowledge. If he failed in care to an extent that would in the absence of name, and have explicitly enounced what always implicitly existed. The French doctrine on the question of degrees of negligence is treated by Laurent, *Principes de Droit Civil*, vol. xvi., *De la faute*, § 213, 216. What is said in this passage has, however, reference to *l'inexécution des obligations*. See Code Civil, Art 1137. For the rules applicable *dans les délits et les quasi délits*, see Code Civil, Arts. 1382-1386.

Shearman and Redfield, *Law of Negligence* (4th ed.), § 47, conclude: "That three degrees of care, are, and should be recognised and enforced by the law of modern times;" and Campbell, *Law of Negligence* (2nd ed.), 4, speaks of a departure from *exacta diligentia* as *culpa levissima*. See Moyle, *Justinian's Institutes*, Excursus 6; Poste, *Gains* (3rd ed.), 452-454.

¹ "Kinds are classes between which there is an impassable barrier; and what we have to seek is, marks whereby we may determine on which side of a barrier an object takes its place": Mill, *Logic* (4th ed.), vol. ii. 268.

² Hasse, III.

knowledge make him liable on the basis of *culpa lata*, his failure would still be referable to his duty as a specialist; and if he failed in knowledge, it would still be the same test—that of the specialist—that would be applied.

It is not, then, correct to describe the division of negligence into *culpa lata* and *culpa levis* as a division into degrees of negligence.¹ The negligence designated by these words is not a negligence that shades down gradually the one into the other, but different kinds of negligence that will run on, each in its own course, without nearer approach through all their phases.

Consideration
of the import
of this
division.

The division, however, is of great value, and is applicable to the whole field of law that is occupied with rights arising out of contract, and wrongs independent of contract. Hence arises a fourfold division.

I. *Culpa lata* (*non intelligere quod omnes intelligunt*).²

(a) In the case of rights arising out of contract.

(b) In the case of wrongs independent of contract.

II. *Culpa levis* (lack of the diligence of the good business man in his business.)

(a) In the case of rights arising out of contract.

(b) In the case of wrongs independent of contract.

On consideration it will be apparent that the duty to exercise the care of the non-specialist is far more likely to arise in cases of tort, and the duty to exercise the care of the specialist is more likely to arise in cases of contract. For the making a contract, or the entering into a relation from which a relation analogous to a contract naturally arises, implies an undertaking to exercise the amount of skill necessary for its efficient performance—*Spondet peritiam artis*; while those positions into which people are thrown without premeditation or design are mostly of a sort that require no more care or skill in their performance than is required from ordinary persons indiscriminately and universally. As the circumstances out of which the duties arise are more or less fortuitous, so the duties themselves do not require for their performance any special acquirement as distinguished from special care. Though, then, under the head of *culpa lata* many cases may be found where the liability for absence of care is to be referred to a contractual obligation, and under the head of *culpa levis* breaches of duty which are referable to the class of wrongs independent of contract, yet, broadly speaking, the cases where liability arises from neglecting the amount of care expected of

¹ As to the distinction between *culpa lata* and *levis* in *abstracto*, or in *concreto*, see Laurent, *Principes de Droit Civil*, vol. xvi., De la faute, § 213. Compare with this vol. xx., Faute Aquilienne, § 462-465.

² D. 50, 16, 223.

every citizen are cases of tort ;¹ the cases where liability arises from neglecting the amount of care such as a good business man would shew in a transaction similar to that investigated are cases of contract.

Where the division of negligence to which cases are to be referred is clearly *culpa lata*, it does not thence follow that the amount of default which imputes negligence in each case is the same. Within the limits of the class to which the standard of *culpa lata* is applicable there are very varying degrees required to fix liability. Three leading classes of cases may be indicated :—

I. Those cases where the act complained of is an infringement of a right in the injured person superior to the right of the injurious person to act in the manner which produces the act complained of. Three classes
of *culpa lata*.

II. Those cases in which the person injured by the act complained of is in the exercise of a right equal to that exercised by the person who injures him.

III. Those cases in which the person injured by the act complained of is acting in a manner subordinate to the right of the person to do the class of acts by which the person is injured.

I. The person injured by the act complained of is in a superior position where, save for the presence of the negligent person, his right to be where he was (or to exercise the right in respect of which he is injured) is a right attaching to property. Thus, in an early case of trespass *quare clausum fregit*, the defendant pleaded that he owned land adjoining that of the plaintiff upon which there was a thorn hedge; that he cut the thorns, and that they against his will (*ipso invito*) fell on the plaintiff's land, and the defendant went quickly upon the same and took them; which was the trespass complained of. Judgment on demurrer was given for the plaintiff. Choke, C.J., said: "When the defendant cut the thorns and they fell on the land the falling was not lawful, and as to what was said about their falling in *ipso invito*, that is no plea, but he ought to show that he could not do it in any other way, or that he did all in his power to keep them out"² Here the owner of the land was entitled to the enjoyment of his land free from any molestation whatever, and any damage done, unless the doer was absolutely free from blame, was actionable. Of this kind are all acts in the nature of trespass. The First class:
Injured person exercising
superior right.

¹ Cases like *Doorman v. Jenkins*, 2 A. & E. 256, are possibly an exception, though *quare* whether there the duty was not that of the *business man* as against the duty to know what all know and to see what all see.

² Y. B. 6 Ed. IV. 7, pl. 18. A.D. 1466, cited in Ames, Cases in Tort, 69.

act *per se* imports an actionable wrong; and unless the act is shown to have been inevitable, the defendant is liable.

Second class :
Injured person exercising
an equal right.

II. Those cases in which the person injured by the act complained of is in the enjoyment of a right equal to that exercised by the person who injures him.

Every subject within the realm has *prima facie* a right to pass and repass along the public highways of the realm. If, in exercising this right, any subject receives damage from another in the exercise of his right, such subject has to bear his own loss unless he can establish that that other is in fault and liable to make it good. "And he does not establish this against a person merely by showing that he is owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is owner."¹ The maxim of the law is *culpa tenet suos auctores tantum*; or loss lies where it falls; so that where the defendant bought a horse at Tattersall's and the next day took him out to try him in a public thoroughfare, where the horse became restive, ran upon the pavement, and killed a man, his administratrix was held not entitled to maintain an action, because the duty on the defendant was only to use due care and skill²—the *quæ a prudente provideri possunt* of the Roman law; and a distinction was drawn during the argument between the case where a carrier is bound to provide for the safe conveyance of his passengers as far as human skill and foresight can go; and a case, like that before the Court, where the defendant was doing no more than he was rightfully entitled to do—viz., to ride in a public place, until he is shown to be guilty of some description of unskilfulness or imprudence.³

Scott v.
London and
St. Katharine's
Dock Com-
pany.

If both parties to the accident are in the exercise of their public rights no action can be sustained, unless one is affirmatively shown to have fallen short of that care and caution which is ordinarily to be expected from persons in the enjoyment of similar rights. If, however, the person charged with the injury is not in the exercise of his public rights a severer liability is affixed to his act. Thus, where a sack or a barrel falls from a house and injures a passenger in the public street, the fall, though unaccounted for, is sufficient to put the defendant to disprove negligence.⁴ The case here becomes assimilated to that noticed under the first class of cases; and the plaintiff, while exercising his public right, is

¹ River Wear Commissioners v. Adamson, 2 App. Cas. 743, at 767.

² Hammack v. White, 11 C. B. N. S. 588; Manzoni v. Douglas, 6 Q. B. D. 145.

³ Cp. Skinner v. London, Brighton, and South Coast Railway Company, 13 Ex. Ch. 5 Ex. 787.

⁴ Scott v. London, &c., Dock Company, 3 H. & C. 596; Byrne v. Boadle, 2 H. & C. 722.

protected to the same extent to which he is protected (if the right were a private right) against any occurrence, not ordinarily to be anticipated to arise from the act of an ordinary prudent man in the exercise of an equal right to the use of the highway, and not *prima facie* referable to the exercise of any private right. The plaintiff's security is more assured; the defendant's liability is greater; not merely for those acts which he can help, but for those that he cannot explain. Or, to put it another way, the plaintiff is injured while in the enjoyment of his personal rights; if the injury is inflicted by another person with equal rights and in the enjoyment of them, in order to affect him with liability it will be necessary to show that he has not acted as an ordinary prudent person in similar circumstances would act. The second case is where a person is in the exercise of his public rights and is injured by an act not referable to the exercise of similar rights by another; in which case a greater care is required of those so acting, though not an amount of care in excess of what would be required of a reasonably prudent man.¹

Again, to take the sort of case of which *Indermaur v. Dames*² is the leading example, where one man comes on the premises of another for the purpose of transacting some business with him, or in the pursuit of some object that implies an inducement held out from the owner for him to go there; at first sight it would appear that his position is subordinate to the rights of the owner of the premises. Yet, in fact, this is not so, since the law in cases of that description presumes a right on the part of the stranger to all reasonable and proper provision for his safety. The right of the one to use his property in what way he pleases is *in equilibrio* with the right of the other to visit the premises in safety; and the owner's duty is to take reasonable care of his visitor's safety while on his premises, and to light, guard, or protect in his interest all those portions of the premises from which unusual danger may be anticipated.

III. Those cases in which the person injured by the act complained of is acting in a manner subordinate to the right of the person to do the class of acts by which the person is injured. Thus, where one goes to a house as a visitor, and not on business, and sustains injury from the condition in which the premises happen to be, he will not be able to recover;³ or if the owner of a dangerous way permits the way to be used by one knowing of the danger, who is injured thereby, he cannot recover; because

Indermaur v. Dames.

Third class:
Injured person exercising a subordinate right.

¹ *Tarry v. Ashton*, 1 Q. B. D. 314. Cp. *The European* (1885), 10 P.D., 99, 101.

² L. R. 2 C. P. 311.

³ *Southcote v. Stanley*, 1 H. & N. 247.

he was not obliged to use the way, and the owner was not obliged to make it any safer because he allowed it to be used.¹ The condition, then, of the way, though defective with regard to those who would use it by invitation,² whether expressed or implied, is not defective with regard to those who use it by permission,² that is, who choose to go there of their own accord and are not hindered by the owner. Nevertheless if, after giving permission to use a way, some act is done which renders the user of the way more dangerous than it was at the time of granting permission to use it, the defendant is liable.³

Distinction of
degrees of
blame.

In the instances we have considered, very different amounts of proof are requisite to establish a *prima facie* case of negligence. In the first class, the mere happening of an accident is enough. In the second, some independent circumstance of fault is needed in addition. In the third, there must be evidence of a positive misdoing. In all, the fault is *lata* in the sense of being non-expert. In the first class, the negligence is the omission of that care which very attentive and vigilant persons take of their own goods; or in other words, of very exact diligence.⁴ In the second, the negligence is the want of that diligence which the generality of mankind use in their own concerns—that is, of ordinary care.⁵ In the third, the negligence is that want of slight diligence which Story describes as “gross negligence.”⁶

Chadwick v.
Trower.

This is illustrated by Parke, B., in *Chadwick v. Trower*,⁷ delivering the judgment of the Exchequer Chamber. The question was, in what circumstances a person who pulled down his wall was bound to give notice to the owner of an adjoining vault. After pointing out the difference between the case where there is knowledge of the existence of the adjoining vault, and where there is not, the learned judge said: “For one degree of care would be required where no vault exists, but the soil is left in its natural and solid state; another, where there is a vault; and another and still greater degree of care would be required where the adjoining vault is of a weak and fragile construction.” Here then, there is no doubt on the part of the Exchequer Chamber of how many degrees of negligence there are, and how they may be discriminated.

¹ *Bolch v. Smith*, 7 H. & N. 736; *Gautret v. Egerton*, L. R. 2 C. P. 371.

² *Indermaur v. Dames*, L. R. 2 C. P. 311.

³ *Corby v. Hill*, 4 C. B. N. S. 556; *Sweeny v. Old Colony and Newport Railroad Company*, 92 Mass. 368. *Bigelow*, L. C., on Torts, 660.

⁴ *Jones*, Bailm. 22, 118; cp. *Gregory v. Piper*, 9 B. & C. 591.

⁵ *Jones*, Bailm. 22, 118.

⁶ Bailm. § 17.

⁷ 6 Bing. N. C. 1, 10. Speaking of Parke, B., Blackburn, J., describes him, in *Brinsmead v. Harrison*, L. R. 7 C. P. 547, at 554, as “the most acute and accomplished lawyer this country ever saw.”

Turning to the division of negligence known as *culpa levis*, in the sense of failure of an expert to bestow the amount of diligence required of him—a division that will be found to be concerned mainly with relations arising out of contract—a similar difference in the amount of the evidence necessary to raise the presumption of negligence will be found.

Three classes
of *culpa levis*.

The notion of a contract suggests a principle of give and take, which places the parties, theoretically at least, on an equality; and therefore the typical case of a contract would require from each party to it the care and prudence of an average reasonable man of the time when, and in the circumstances with respect to which, the contract is entered into. This assimilates the general rule in

The normal
case of expert
diligence.

Care of an
average
reasonable
man.

contract with the second of the classes we have considered in tort. Further, there are circumstances from which contractual obligations arise or are constituted, which exact duties of greater or less stringency than those of the most ordinary occurrence. Thus, a passenger in an omnibus is injured by a blow from the hoof of one of the horses, which kicks through the front panel of the vehicle. There is no evidence that the horse is a kicker, but it is proved that the panel bears marks of other kicks, and that no precaution has been taken by the use of a kicking-strap or otherwise, against the possible consequences of a horse striking out. This has been held evidence of negligence,¹ Bovill, C.J., going the length of saying that the fact of a horse kicking out “alone presents a case that calls for some explanation on the part of the proprietors.” If that be so, it is difficult to imagine a case that realizes more nearly Dr. Wharton’s most exacting translation of *levissima culpa*, “infinitesimal negligence.” But assuming the statement to be too wide, and the decision to turn on the absence of a kicking-strap, it does not seem to have been contested that “it is not the practice to apply a kicking-strap to horses drawing private carriages”; that being so, “is an omnibus proprietor bound to use a higher degree of care and caution in this respect than any gentleman adopts for the safety of himself and family?” This, says Bovill, C.J., “becomes a fair question for the jury.” In other words, there is some evidence of negligence in a case of this kind, in not adopting greater precautions than the ordinary business man adopts in his private concerns. The other judges, or at least Grove, J., lay principal stress on their being “marks of other kicks on the omnibus.”

Minute care
Simson v.
London
General
Omnibus
Company.

As the other extreme, take the case where a railway company have on their platform a portable weighing machine, the foot of

¹ *Simson v. London General Omnibus Company*, L. R. 8 C. P. 390: *Patteson v. Kidman*, 8 N. S. W. R. Law 488.

which projects about six inches above the level of the platform, in which, the plaintiff, being pushed about in a crowd, catches his foot, falls over, and is injured; it is not negligence in the company so to have it.¹

Three kinds
of a banker's
liability.

The bank that (1) allows a deposit of deeds in its vaults;² that (2) receives them in the way of business as a pledge for advances;³ that (3) receives them for some temporary purpose for its own advancement;⁴ is bound in the first case to slight diligence, the absence of which is gross negligence; in the second, to ordinary diligence; and in the third, to great diligence. To render a defendant liable, it is not sufficient to bring him within either of the classes that later writers on the Roman law have determined to be the criteria in that law; a further inquiry is necessary, whether, after the character of specialist, say, has been found applicable to the person to be charged, the degree of his default is enough to render him liable in the circumstances. Whether general slackness of attention must be proved; or whether proof of lack of ordinary business prudence in some particular is needed; or whether there need only be shown the failure, in some particular, of diligence of that unusual kind, which only exceptional confidence, bestowed on the defaulter and raising a corresponding duty in him, could justify, is in each case a separate inquiry.

Once more—in that vast class of cases in which the power of steam is applied to providing for human requirements, the duty to take care imposed on those using it, is far in excess of that required of those concerned with the feebler agencies of former times; and, in the opinion of very eminent judges, has become so extremely exacting that it seems difficult to express the amount of care required in terms of too great strictness. Thus, to quote an eminent United States judge: “When carriers undertake to carry passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence”;⁵ and similar and even stronger expressions are constantly to be found in the judgments of both English and American judges in this connection.⁶

¹ *Cornman v. Eastern Counties Railway Company*, 4 H. & N. 781; cp. *Sturges v. Great Western Railway Company*, 8 Times L. R. 231.

² *Giblin v. McMullen*, L. R. 2 P. C. 317, 328; *Foster v. The Essex Bank*, 17 Mass. 479.

³ 2 Kent, Comm. 580.

⁴ *Exactissimam diligentiam custodiendæ rei præstare compellitur; nec sufficit ei tandem diligentiam adhibere, quam suis rebus adhibet, si alius diligentior custodire poterit* (D. 44, 7, 1, § 4).

⁵ Per Grier, J., *Philadelphia and Reading Railroad Company v. Derby*, 14 How (U.S.) 468, at 486. As to three degrees see *Tracy v. Wood*, 3 Mason (U.S.) 132.

⁶ *New World v. King*, 16 How. (U.S.) 469, 474. “That under such circumstances

While foreign jurists have attacked the theory of degrees of negligence, mostly by denying the existence of *culpa levissima*, as marking a distinct phase, several eminent English judges, assailing the other end of the scale, have repudiated the existence of gross negligence as a separate degree.¹

*Hinton v. Dibbin*² is the first of this class of cases that needs separate mention, and is the earliest decision under The Carriers Act, 1830.³ The decision was that since under the Act the carrier was protected against liability for negligence, this must be held to include gross negligence. In the course of his judgment, Lord Denman, C.J., said: "When we find 'gross negligence' made the criterion to determine the liability of a carrier who has given the usual notice, it might perhaps have been reasonably expected that something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made; and it may well be doubted whether between 'gross negligence' and negligence merely, any intelligible distinction exists."

To rightly appreciate what is here said it must be borne in mind that the Act of Parliament which was being interpreted had to do exclusively with carriers—that is, with specialist negligence, the *levis culpa* of Dr. Wharton. Consequently from his point of view gross negligence or non-specialist negligence could not have been involved at all. The term must therefore be used in another sense. Manifestly the question was whether the negligence of the specialist could be so subdivided that one degree should import immunity, under the protection of the Act, while a further degree would imply liability because of its aggravated character. The decision by implication goes the length of admitting degrees of negligence within the range of *levis culpa*, though declining in the circumstances present to note them or to attempt their discrimination.

The next case, *Wilson v. Brett*,⁴ is famous for the *dictum* of Rolfe, B.: "I said I could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet;" which has been repeated again

the defendant was bound to use the highest degree of care and prudence, the utmost human skill and foresight is the settled law," per Earl, J.; *Coddington v. Brooklyn*, 102 N. Y. 66, at 69. "He," the carrier of passengers, "is reponsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill"; per Harlan, J., *Pennsylvania Railroad Company v. Roy*, 102 U.S. (12 Otto) 451 at 456.

¹ In *Cornish v. Accident Insurance Company*, 23 Q. B. Div. 453, Lindley, L.J., at 457, affirms the existence of degrees of negligence.

² 2 Q. B. 646.

³ 11 Geo. IV. and 1 Will. IV. c. 68.

⁴ 11 M. & W. 113.

The meaning
of gross
negligence.

Hinton v.
Dibbin.

Wilson v.
Brett: dictum
of Rolfe, B.

and again as conclusive of the whole matter. The defendant in *Wilson v. Brett* was a person conversant with horses, and was entrusted with one by the plaintiff for the purpose of riding it to shew to an intending purchaser. While he was showing the horse it fell down and broke its leg. Rolfe, B., in summing up to the jury at the trial of an action brought for the alleged negligence, left it to them to say whether the defendant was guilty of "culpable negligence" in the manner and in the circumstances in which he rode the horse, and directed them that the defendant, "being shewn to be a person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it."

Considered.

Adopting Dr. Wharton's and the "classic jurists'" notation, the care the defendant was to exercise was that of the specialist; his negligence then was *culpa levis*. A new trial was moved for on the ground that Rolfe, B., misdirected the jury by telling them that the rule applicable was the rule of specialist diligence, and not of ordinary diligence, and *culpa lata*, not *culpa levis*, indicated the class of default under which the defendant must be brought to make him liable; and the test applicable was that of an ordinary person's knowledge, knowing nothing particular about horses, not that of a person conversant with horses.¹

"If," said Rolfe, B., on the argument of the rule, "a person more skilled knows that to be dangerous, which another, not so skilled as he, does not, surely that makes a difference in the liability." It would follow then that the defendant being bound to exercise the skill of an expert, and, failing to do so, would be guilty of negligence, and liable for such failure; so that whether the judge had charged the jury that such failure was negligence, or negligence with a vituperative epithet, in either case the term connotes the lack of the diligence a person of competent skill would use in the circumstances. That Rolfe, B., never intended his words to be taken as the expression of an opinion that the term "gross negligence" does not signify any distinctive degree of negligence, or, if he did, that afterwards and in a position of even greater responsibility, he deliberately adopted a contrary view, may be seen from subsequent judgments of his when Chancellor and in the House of Lords. *Colyer v. Finch*² is a case in point. There the subject discussed was in what circumstances a first mortgagee, having the legal title, but not having possessed himself of the title-deeds, is to be postponed to a subsequent purchaser or mortgagee. The matter would range itself under Dr. Wharton's division of *culpa levis*, want of expert dili-

*Colyer v.
Finch.*

¹ See argument of Serjt. Byles, at 114.

² 5 H. L. C. 905.

gence. Mere negligence in obtaining the deeds, Lord Cranworth points out, is not enough; there must be a higher degree; "the party claiming by title must satisfy the Court that the first mortgagee has been guilty either of fraud or of gross negligence, but for which he would have had the deeds in his possession." "What are the circumstances," the Lord Chancellor continues, "which will amount to, or be evidence of, gross negligence it is difficult to define beforehand, but I think that *prima facie* a mortgagee who, knowing that his mortgagor has title deeds, omits to call for them, or who omits to make any inquiry on the subject, must be considered to be guilty of such negligence as to make him responsible for the frauds which he thus has enabled his mortgagor to commit." Hence it is obvious that Lord Cranworth's authority is not to be engaged on the side of that view which identifies negligence and gross negligence apart from the circumstances of some particular case where the distinction may be irrelevant.

Gross negligence is considered once more in *Beal v. South Devon Railway Company*.¹ There the question was whether a condition excepting from liability, save in the cases of gross neglect and fraud, was a reasonable condition within the provisions of the Railway and Canal Traffic Act, 1854,² s. 7. The division of negligence to which this is referable is again the *culpa levis* of Dr. Wharton. The carrier is an expert, and bound to expert diligence. The general test being thus determined, it remained to decide what was gross neglect under that classification, and in what respect gross negligence differs, if at all, from negligence without the epithet. In the judgment by Crompton, J., in the Exchequer Chamber, this is dealt with. "In the case of a carrier or other agent holding himself out for the careful and skilful performance of a particular duty," it is said, "gross negligence includes the want of that reasonable care, skill, and expedition which may properly be expected from persons so holding themselves out and their servants. It is said that there may be difficulty in defining what gross negligence is, but I agree in the remark of the Lord Chief Baron in the Court below, where he says, 'There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them.' The authorities are numerous, and the language of the judgments various; but for all practical purposes the rule may be stated to be that the failure to exercise reasonable care, skill, and diligence is gross negligence. What is

Beal v. South Devon Railway Company.

Judgment of Crompton, J., in the Exchequer Chamber.

¹ 3 H. & C. 337.

² 17 & 18 Vict. c. 31.

reasonable varies in the case of a gratuitous bailee and that of a bailee for hire. From the former is reasonably expected such care and diligence as persons ordinarily use in their own affairs, and such skill as he has. From the latter is reasonably expected care and diligence such as are exercised in the ordinary and proper course of similar business, and such skill as he ought to have—namely, the skill usual and requisite in the business for which he receives payment. The company therefore, properly speaking, exclude their liability as insurers, and not their liability for a want of reasonable care, skill, and expedition. This is well illustrated by the case of actions against attorneys, where the law only attaches in the case of gross negligence, which a jury has always been supposed competent to deal with under the directions of a judge; and it seems to us that the degree of negligence which the law points out as that which is necessary to make a professional paid agent liable is not an unreasonable criterion of the reasonableness of the limit to which the carrier seeks to restrict his liability.”

What gross negligence is.

Now, though there are expressions in the above judgment that point to different considerations, the negligence for which alone attorneys are to be held liable is clearly indicated in well-known cases¹ to be *crassa negligentia*; which Lord Campbell, in the House of Lords, thus describes:² “You can only expect from him [the attorney] that he will be honest and diligent; and if there is no fault to be found either with his integrity or diligence, that is all for which he is answerable. It would be utterly impossible that you could ever have a class of men who would give a guarantee, binding themselves, in giving legal advice and conducting suits of law, to be always in the right.” The distinction between gross and ordinary negligence is here intelligibly intimated, if not positively expressed. Gross negligence is not presumed from the existence of mistake if there is no falling short in integrity or diligence. Mistake, though conjoined with integrity and diligence, will raise the presumption of negligence where the matter, with regard to which the mistake is made, is part of the ordinary course of business.

Grill v.
General Iron
Screw Collier
Company.

In *Grill v. General Iron Screw Collier Company*,³ Willes, J., expresses his agreement “with the *dictum* of Lord Cranworth in *Wilson v. Brett*,⁴ that gross negligence is ordinary negligence

¹ *Pitt v. Yalden*, 4 Burr. 2060; *Baikie v. Chandless*, 3 Camp. 17; *Godefroy v. Dalton*, 6 Bing. 460; *Purves v. Landell*, 12 Cl. & Fin. 91. See also Bell, *Commentaries*, vol. i. (7th ed.) 483.

² *Purves v. Landell*, 12 Cl. & F. 91 at 103.

³ L. R. 1 C. P. 600, which report is both confused and confusing; the case is much better reported 35 L. J. C. P. 321.

⁴ 11 M. & W. 113.

with a vituperative epithet—a view held by the Exchequer Chamber: *Beal v. South Devon Railway Company*.”¹ We have just seen what the view held by the Exchequer Chamber was. The present case was an action on a bill of lading to recover Case stated. against the shipowner for the loss of certain goods, which he was to carry, “barratry of master or mariners, accidents or damage of the seas, rivers, or navigation of whatever nature or kind soever excepted.” The goods perished in a collision due to the negligence of those on board the carrying vessel. At the trial a verdict was entered for the plaintiff, with leave reserved to the defendants to enter the verdict on the ground that the conduct of the persons in charge of the defendant’s ship brought the case within the exception of barratry in the bill of lading. The defendant also complained that the Lord Chief Justice at the trial made no distinction between gross and ordinary negligence, gross negligence being pleaded in the replication, while the jury had no opportunity of finding whether there was *gross* negligence or not. Here, again, the diligence required of the carrier is Willes, J.’s, dictum considered. specialist diligence, and the negligence which had to be shewn was *culpa levis*. “A person,” says Willes, J., “who undertakes to do some work for reward to an article must exercise the care of a skilled workman, and the absence of such care is negligence.” Negligence in this sense was admitted. The contention was that the negligence to support the replication must be *gross* as distinguished from negligence merely. The answer in effect was that negligence having been found, the liability attached; and since, whether the negligence were called gross or merely negligence without any adjunct, the term would have had to be explained to the jury² in identical terms, the presence or omission of the adjective was immaterial. Then this is with reference to the facts in the case, not with reference to the greater or less negligence required to found liability in other cases.

Where negligence is found to exist in certain circumstances, it Negligence, how classified. is immaterial whether the actual amount with regard to the actual case is more or less; since, when the standard of liability is reached, excess will not affect the result. There is a difference where a comparison of circumstances is to be made. Then the same subject-matter may elicit different degrees of care, just as the

¹ 3 H. & C. 337. Again, in *Lord v. Midland Railway Company*, L. R. 2 C. P. 339 at 344, the same learned judge says: “Any negligence is gross in one who undertakes a duty and fails to perform it. The term ‘gross negligence’ is applied to the case of a gratuitous bailee who is not liable unless he fails to exercise the degree of skill which he possesses.”

² See per Montague Smith, J., L. R. 1 C. P. 600, at 614.

position of those with a duty in regard to it may vary. To bring a case within the rule of liability more negligence may have to be shown if it is to be referred to one class of cases rather than to another class of cases. As between the two classes the different amounts of negligence may be discriminated as negligence merely, or gross negligence, or slight negligence. But when once an act or default has been shewn which is negligent with reference to any particular class of cases further proof is unnecessary, for the distinction of degrees of negligence is between different classes or heads of liability, not between different cases referable to the same class. So soon as the point of view of the person with regard to the subject-matter is fixed, there is no room for degrees of negligence within the range of *dolus* on the one side or the minimum that imports liability on the other. Where different persons are related to the same subject-matter, it is plain their relation to it is not necessarily the same. One may be liable for acts that the other may do with impunity, and be excused for acts that render a third liable; and this though all may be bound to the diligence of specialists. This variety is conveniently discriminated by the terms slight, ordinary, and gross negligence. As Montague Smith, J., in this very case says:¹ "There is no doubt that the expression 'gross negligence' is to be found in some of the decisions; but it is only one mode of expressing, perhaps, that in a particular case there is a less degree of care required than there might be in other cases." Assuming liability to exist, it will not be affected by more or less negligence; yet it may be material, where liability is not found to exist, to discriminate that which will import liability in one case from the degree of negligence which will import it in another.

Gross negligence discussed in *Cashill v. Wright*.

The subject of gross negligence was again much discussed in *Cashill v. Wright*,² where misdirection was alleged in failing to point out to the jury the degrees of negligence that would import liability, and the Queen's Bench made a rule absolute for a new trial. In delivering the considered judgment of the Court, Earle, J., said: "It does not appear that there was any information given to the jury as to what they were to understand by gross negligence. If they were told to understand by gross negligence the absence of that ordinary care which, under the circumstances, a prudent man ought to have taken, as seems to have been the meaning given to gross negligence in some of the

¹ *Grill v. General Iron Screw Collier Company*, 35 L. J. C. P. 321 at 331; *Giblin v. McMullen*, L. R. 2 P. C. 317, 324; *Railroad Company v. Lockwood*, 17 Wall. (U.S.) 357, 382, where are references to the French law. ² 6 E. & B. 891, 899.

modern cases cited before us, the direction as to the degree of negligence might not have been objectionable; but the legal meaning of gross negligence is greater negligence than the absence of such ordinary care. It is such a degree of negligence as excludes the loosest degree of care, and is said to amount to *dolus*.¹ To the like purport is the description given by Swayne, J.:² "Gross negligence on the part of a gratuitous bailee, though not a fraud, is in legal effect the same thing."

It is apparent from the preceding considerations that the term gross negligence is used in distinct senses. Sometimes it is used to signify non-specialist negligence. Sometimes it is used to express a different amount either of specialist or non-specialist negligence; for example, to discriminate between the negligence of a banker as gratuitous bailee of his customers' securities, and as entrusted with them for some purpose of his own sole advantage; and sometimes it is used as indicating a greater negligence in some particular than ordinary, where ordinary negligence would yet suffice to affix liability. It is in the confusion of these various senses of the term that any obscurity or difficulty in the treatment of gross negligence takes its rise.

The existence of "gross negligence" has sometimes been considered of importance with reference to the giving of vindictive or exemplary damages. There is no doubt that, in actions for seduction or for malicious injuries, juries have been allowed to give vindictive damages, taking all the circumstances of the case into consideration;³ and so too in any case in which the process of the Court has been abused, and outrage has been committed under the forms of law.⁴ In the case of negligence there is a difference, and the law will not allow punitive damage unless the

¹ See *Taylor v. Russell* (1891) 1 Ch. 8. judgment of Kay, J., and *post*, Estoppel.

² *National Bank v. Graham*, 100 U.S. (10 Otto) 699, 702. "Gross negligence" is fully discussed by Bradley, J., *Railroad Company v. Lockwood*, 17 Wall. (U.S.) 357, 382; see also *Briggs v. Spaulding*, 141 U.S. (34 Davis) 132, 151.

³ *Berry v. Da Costa*, L. R. 1 C. P. 331; *Terry v. Hutchinson*, L. R. 3 Q. B. 599. *Doe v. Filliter*, 13 M. & W. 47, 51; *Merest v. Harvey*, 5 Taunt 442; *Whitham v. Kershaw*, 16 Q. B. Div. 613, at 618, per Bowen, L. J. Vindictive damages are said to be allowable in *Denver, &c., Railroad v. Harris*, 122 U.S. (15 Davis) 597, at 609, "in actions of trespass where the injury has been wanton or malicious, or gross and outrageous;" see also *Lake Shore, &c. Railroad Company v. Prentice*, 147 U.S. (40 Davis) 101, at 107; per Gray, J. "In this Court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called smart money, if the defendant has acted wantonly or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages." This principle of assessment is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or servant.

⁴ *Gregory v. Sloman*, 1 E. & B. 360, 370; *Duke of Brunswick v. Slowman*, 8 C. B. 317, 329.

conduct complained of is more than negligent, and amounts to gross misconduct.¹ The reason for the difference is indicated by Davis, J., in *Milwaukee v. Arms*.² "Redress commensurate to such injuries," he says, "should be afforded. In ascertaining its extent the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go further, unless it was done wilfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. . . . The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages."³ It is insisted, however, that where there is 'gross negligence' the jury may properly give exemplary damages. There are many cases to this effect. The difficulty is that they do not define the term with any accuracy." When, then, gross negligence amounts to *dolus*, within the meaning of the maxim *Magna negligentia culpa est, magna culpa est dolus*,⁴ or there is an injury, wilful or negligent, which is accompanied with expressions of insolence,⁵ then, and then only, will it be matter for exemplary damages.

¹ *Cleghorn v. New York Central Railroad Company*, 56 N. Y. 44.

² 91 U. S. (1 Otto) 489, 493.

³ That is, negligence in the third sense indicated above.

⁴ D. 50, 16, 226.

⁵ *Emblen v. Myers*, 6 H. & N. 54; *Bell v. Midland Railway Company*, 30 L. J. C. P. 273, 281. In *Wilkes v. Wood*, 19 How. St. Tr. 1153, at 1167, Pratt, C.J. said: "Notwithstanding what Mr. Solicitor-General has said, I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." See per Lord Blackburn, *Livingstone v. Rawyard's Coal Company*, 5 App. Cas. 25, at 39. The subject of "nominal damages" and the circumstances in which they are applicable are considered in *Stanton v. New York, &c., Railroad Company*, 59 Conn. 272, 21 Am. St. R. 110. In *Spokane, &c. Company v. Holfer*, 26 Am. St. R. 842, 846-850, "punitive damages" are discussed, and the awarding them is stated to be "unsound in principle and unfair and dangerous in practice"; but see the more authoritative statement in 2 Kent, Comm. 15 n (a) where the rule is thus expressed "If a case be free from fraud, malice, wilful negligence, or oppression, the compensation is taken strictly for the real injury or actual pecuniary loss to the party, and, perhaps, the natural and legal consequences of the act complained of, and the actual costs and expenses sustained. But if fraud, malice, or *mala mens* mingle in the controversy, the claim goes beyond absolute compensation, and punitive, vindictive, or exemplary damages by way of punishment and for example's sake seem to be admitted."

CHAPTER III.

LIMITS OF LIABILITY.

THE general definition of negligence, that we have adopted, is Introductory. "absence of care according to the circumstances." The breadth of this generalisation manifestly contemplates the formation of a number of subordinate principles applicable to the special heads under which liability for negligence may be grouped. To these special heads, then, must be referred the more detailed consideration of the subject. Yet certain comprehensive principles there are which mark out the scope within which these subordinate principles operate, and which specify more definitely than the general definition the limits within which legal negligence is to be sought.

At the outset, it is clear that to found a liability for negligence there must be some person, as distinguished merely from some agency, to whom legal liability may be imputed. The leading case illustrating this position is *Scott v. Shepherd*.¹ Defendant threw a lighted squib in a market which fell upon the standing of one Y; a bystander W "instantly, and to prevent injury to himself and the said wares of the said Y, took up the said lighted squib from off the said standing and threw it across the said market-house, where it fell upon another standing of one R, who sold the same sort of wares, who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and threw it to another part of the said market-house, and in so throwing struck the plaintiff, then in the said market-house, in the face therewith, and the combustible matter, then bursting, put out one of the plaintiff's eyes." That the defendant was guilty of an actionable wrong all were agreed. The question was whether trespass or case was the proper form of action in which to sue. Blackstone, J., dissenting from the rest of the Court, was of opinion that the wrong was not a trespass.

Accountable
agency
necessary
to found
liability.
Scott v.
Shepherd.

Blackstone,
J.'s, dissent.

¹ 3 Wils. 403, 1 Sm. L. C. (9th ed.) 480.

Judgment of
the Court as
expressed by
De Grey, C.J.

De Grey, C.J., said: "Every one who does an unlawful action is considered the doer of all that follows; if done with a deliberate intent, the consequences may amount to murder; if incautiously, to manslaughter (Fost. 261). So, too, in 1 Vent. 295: a person breaking a horse in Lincoln's Inn Fields hurt a man; held, that trespass lay; in 2 Lev. 172 that it need not be laid *scienter*. I look upon all that was done subsequently to the original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting. And I think that any innocent person removing the danger from himself to another is justifiable. The blame lights upon the first thrower. The new direction and new force flow out of the first force, and are not a new trespass. The writ in the Register 95a for trespass in maliciously cutting down a head of water, which thereupon flowed down to and overwhelmed another's pond, shews that the immediate act needs not to be instantaneous, but that a chain of effects connected together will be sufficient. It has been urged that the intervention of a free agent will make a difference; but I do not consider W and R as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation."

Principle
deducible.

So long then as an injurious agency is operating through the direct and undiverted impulsion of a responsible agent, so long the liability of the agent continues, though the force is transmitted through a variety of stages. The only condition seems to be that in none of these stages is an originating or diverting power exercised. There has indeed been considerable discussion about *Scott v. Shepherd*, turning not so much on the validity of the principles laid down therein as on the suitability of the actual facts to illustrate them. Accepting the view of De Grey, C.J., that W and R's acts were done "under a compulsive necessity for their own safety and self-preservation," his conclusion seems inevitable; and it has since been generally accepted as sound except in the case of *Fitzsimons v. Inglis*;¹ where the reporter remarks, "the Court slighted the authority of this case." It accordingly becomes important to consider who the law regards as responsible agents.

I. WHO ARE RESPONSIBLE AGENTS.

Idiots,
maniacs, and
children too
young to
exercise any
discretion.

(1) Dr. Wharton² says positively, "neither an idiot nor a maniac can be a juridical cause. And the same reasoning

¹ 5 Taunt. 534. I do not find that this case has been subsequently noticed. The principle of *Scott v. Shepherd* is forcibly stated in *Mahogany v. Ward*, 27 Am. St. R. 753, 755, citing Wharton, §§ 134, 145, 999.

² Negligence, § 88.

applies to persons so young and inexperienced as to be unable to exercise intelligent choice as to the subject-matter."¹ Messrs. Shearman and Redfield² are equally positive the other way. "We are unable," they say, "to find any direct authority for holding infants responsible for the want of more care than might reasonably be expected of their age; but, as no degree of care could be expected from violent lunatics, who have, nevertheless, been held civilly responsible for their trespasses, there does not seem to be any sound reason for making such a distinction!"

The Roman law is pretty clear. In the *lex Aquilia*⁴ there is Roman law. the following: "*Et ideo quærimus, si furiosus damnum dederit an legis Aquiliæ actio sit? Et Pegasus negavit; quæ enim in eo culpa sit, cum suæ mentis non sit? Et hoc est verissimum. Cessabit igitur Aquiliæ actio quemadmodum si quadrupes damnum dederit, Aquilia cessat, aut si tegula ceciderit. Sed et si infans damnum dederit, idem erit dicendum. Quod si impubes id fecerit, Labeo ait, quia furti tenetur, teneri et Aquilia eum; et hoc puto verum si sit jam injuriæ capax.*" This follows naturally on the preceding fragment; which indicates that legal injury may be done by a person who does not intend to do harm, and is by way of an exception to the rule there stated, and based on the absence of any capacity to exercise intention, however willing.

The question in English law may, in the state of the authorities, still be looked at as one of principle. The cases simply follow the *dictum* in *Weaver v. Ward*.⁵ To a declaration in trespass, the defendant set up that the plaintiff and he were skirmishing in a trainband, and that when discharging his piece he wounded the plaintiff by accident and misfortune and against his own will. In giving judgment the Court distinguishes between a criminal act and a civil trespass by a lunatic, pointing out that

Weaver v. Ward.

¹ *Dixon v. Bell*, 5 M. & S. 198; Bac. Abr. Infant (H); Simpson, Infants (2nd ed.) 44, 103; Latt. v. Booth, 3 C. & K. 292; 37 & 38 Vict. c. 62; *Valentini v. Canali*, 24 Q. B. D. 166. For the law as to infants under seven years of age, see 1 Russ. Crimes (5th ed.) 108; *Marsh v. Loader*, 14 C. B. N. S. 535, 1 Hale, Pleas of the Crown, 17-19.

² Negligence, § 121.

³ *Krom v. Schoonmaker*, 3 Barb. (N.Y.) 647, is the case of a lunatic magistrate who was held liable for issuing process which had he been sane would have been malicious. There it was said: "in respect of the lunatic, as he has properly no will, it follows that the only measure of damages in an action against him for a wrong is the mere compensation of the party injured."

⁴ D. 9, 2, 5, § 2:

⁵ Hob. 134. The defendant in *Weaver v. Ward* had no business to let his piece go off; perhaps even no business to have had it loaded. There is no reason to suppose that the English law differs from the Roman. Where a man is killed by a javelin thrown by a soldier in *campo locove, ubi solitum est exercitari*, Inst. 4, 3, 4, the *culpa* is all his own; and *quod quis ex culpa sua damnum sentit non intellegitur damnum sentire*, D. 50, 17, 203.

Considered.

in the former case there is no felony "if a lunatic kill a man or the like, because felony must be done *animo felonico*, yet in trespass, which tends only to give damages according to hurt or loss, it is not so, and therefore if a lunatic hurt a man he shall be answerable in trespass." Still it was hard to see why, in the case of the lunatic, an exception should be made to the general rule that one is excused responsibility for the consequences of his act if, in the words of the judgment in *Weaver v. Ward*, "it may be judged utterly without his fault"; or supposing there be no exception, why "if a man by force take my hand and strike you," I should not be liable; while if a lunatic—not in the sense of one merely of defective intelligence, but of one wholly without intelligence—hurt a man he is answerable.¹ The reason for non-liability that the act is "judged utterly without his fault" in the one case would avail at least equally in the other, so long as the law treats the "act of God" as in the case of the carrier, as exempting from a liability otherwise absolute. If the reason given is good, and the illustration is in some cases inconsistent, it would seem that the illustration should bend to the reason and not contrariwise.²

Principle of the irresponsibility of lunatics.

In the case of partial comprehension of his act by the lunatic no difficulty can arise; while in the case of utter irresponsibility, where alone the point can arise, the lunatic would in most cases only be able to do harm through the neglect of some responsible agent who would be answerable in *propria persona*. The injured person would, therefore, not be remediless even where the lunatic (*furiosus*) is without fault; in most cases the remedy against the responsible keeper of an asylum, or, in the case of patients under private control, against him under whose control they are, would be ample. In the event of sudden fury falling on a man who thus afflicted kills another, no action would lie under Lord Campbell's act;³ for there would be "no wrongful act, neglect, or

¹ In *Vin. Abr. Trespass, D. 4*, it is said: "If a lunatic beats a man this shall not excuse him in trespass, because it is but to repair him in damages." *Krom v. Schoonmaker*, 3 Barb. 647. In *Com. Dig. Battery A*, note d, Hammond's ed., it is said: "A man may in the eye of the law be deprived of all control over his will in three ways—either by the motive of self-preservation, by that of preserving others from destruction, or by the visitation of God, namely, in the case of idiocy and madness. It is difficult upon principle to discover any distinction between the instance last supposed and the two former cases; however, authority has declared that if a lunatic hurt a man, he shall be answerable in trespass, *Hob. 134*." But this was merely an illustration and a *dictum*.

² As to the defence of insanity in an action on contract when brought against the party contracting, see *Imperial Loan Company, Ltd. v. Stone* (1892) 1 Q. B. 599. For the history of the change in the law see the judgment of Fry, L.J., at 601. In 2 Kent, Comm. 451, it is said: "The principle advanced by Littleton (sec. 405) and Coke (*Beverley's Case*, 4 Co. R. 123, Co. Litt. 247a), that a man shall not be heard to stultify himself, has been properly exploded as being manifestly absurd and against natural justice." See notes to the 13th edition.

³ 9 & 10 Vict. c. 93.

default" in the sense in which the law understands those terms, neither would there be any action for various reasons at common law. If the injury were not mortal there seems no greater reason that damages should be recovered than for an explosion utterly without fault, or a collision by inevitable accident. Or, again, the rule of law is that loss falls where it lies if *culpa* is not imputable to some other person; the onus then would be to shew a cause of action, what Dr. Wharton terms a "juridical cause"; and on proof of the utter irresponsibility of the lunatic, the plaintiff would have to discharge this *onus*. Again, the better view is that liability for trespass is not absolute and in any event, but dependent on the existence of fault; and here, by hypothesis, there is no fault. The case is much stronger than "if a man by force take my hand and strike you," which is an exception from liability for trespass, according to *Weaver v. Ward*; for it is the act of God which produces the injury.¹ No case concludes the matter; and the principle that liability has its root in some personal fault,² points to the exoneration of one irresponsible for his act;³ while the authority of the Roman law is clearly in the same direction. Dr. Wharton's view, therefore, seems the correct one. Although, whatever may be the legal conclusions with regard to lunatics, there is no doubt that weakness or bodily illness may bring the consequences of negligence. For a weak man without experience

¹ In the American case of *Long v. Chicago, &c., Railroad Co.*, 30 Am. St. R. 271, it is said that an insane person is civilly liable to make compensation in damages to those injured by his acts, and *Cross v. Andrews*, Cro. Eliz. 622, is cited as authority for the proposition. But that case only decides that an innkeeper cannot plead insanity as a discharge of liability for not keeping the goods of his guest safely. This is manifest enough. Business was carried on either by or for the lunatic, and in either case he could not avoid responsibility. The chief difficulty turns on the definition of insanity—a word that is more consistent with a slight aberration than with entire absence of mental capacity.

² Holmes, the Common Law, 81; *Willetts v. Buffalo, &c., Railroad Company*, 14 Barb. 585, at 592.

³ Lord Penzance's *dictum* in *Mordaunt v. Mordaunt*, L. R. 2 P. & D. 109, at 129, should be noticed. "A lunatic at common law is liable to be sued and (until arrest was abolished) held to bail, just the same as a sane man. There is no need at common law for the appointment of a guardian, or the nomination of any one to act in the lunatic's place; the suit proceeds in all respects as if the defendant were sane." This is obviously so, for sanity is to be presumed till the contrary is proved; lunacy may be matter of defence, but is clearly not a bar to an action. The case of *Mordaunt v. Mordaunt* itself has no analogy to the question now being considered. It is undoubtedly true that a lunatic or insane person may from the condition of his mind not be a competent witness. Still his incompetency on that ground, like incompetency for any other cause, must be passed upon by the Court, and to aid the judgment of the Court evidence of his condition is admissible; consequently *prima facie* a lunatic is a competent witness. *Reg. v. Samuel Hill*, 5 Cox C. C. 259. As to the true test of insanity, see judgment of Sir John Nicholl, *Dew v. Clark*, 3 Addams Ecc. C. 79, affirmed by Lord Lyndhurst, 5 Russ. 163; also *Waring v. Waring*, 6 Moo. P. C. 341; the judgment of Cockburn, C.J., in *Banks v. Goodfellow*, L. R. 5 Q. B. 549; and per Sir J. Hannen in *Boughton v. Knight*, L. R. 3 P. & D. 73, and *Smee v. Smee*, 5 P. D. 84. "This part of the law," says Cockburn, C.J., *supra*, at 566, "has been extremely well treated in more than one case in the American Courts," which he cites. To those cited add *District of Columbia v. Armes*, 107 U.S. (17 Otto) 519.

to undertake the management of high-spirited horses, or for one debilitated from sickness to undertake the carrying a heavy load through a crowded thoroughfare, in the case of injury arising to other persons through their incompetency would be imputed to negligence; as the Roman law says: "*nec videtur iniquum si infirmitas culpæ adnumeretur; cum affectare quisque non debeat, in quo vel intelligit vel intelligere debet, infirmitatem suam alii periculosam futuram.*"¹

Persons under
compulsion.

(2) A person under compulsion cannot be viewed as a person legally responsible. The illustration in *Weaver v. Ward*,² goes to establish this. "If a man by force take my hand and strike you . . . so as it had appeared to the Court that it had been inevitable, and that the defendant had committed no negligence," he shall not be liable.³ And the compulsion which discharges from liability is not physical only; but that which arises from terror or the instinct of self-preservation. We have already seen an instance of this in *Scott v. Shepherd*.⁴

Alternative
perils.

In another case, a coach proprietor neglected to provide a proper coupling rein; and a passenger was placed in such a perilous position, in consequence of the breaking of the one supplied, that he jumped off the coach and broke his leg. Lord Ellenborough⁵ directed the jury, that "it is sufficient, if the plaintiff was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril; if that position was occasioned by the default of the defendant, the action may be supported. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover." The inquiry, therefore, is whether the injured person was placed in such a situation as to render what he did a prudent precaution for the purpose of self-preservation. The law is settled in the same sense in America.

No liability
for injury to
bystander.

A consequence that follows is, that, had the plaintiff in leaping injured a person going along the road in the circumstances supposed, he would not be liable, for his act would not be a voluntary

¹ D. 9, 2, 8, § 1.

² Hob. 134.

³ *Cp. Brown v. Collins*, 53 N. H. 442, 16 Am. R. 372, where there is a very instructive judgment by Doe, J.

⁴ 3 Wils. 403; 1 Sm. L. C., 9th ed. 480.

⁵ *Jones v. Boyce*, 1 Starkie, N. P. 493, "which," says Lindley, L.J., in the *City of Lincoln* 15 P. D. 15 at 18, "I have always regarded as sound law." *Pennsylvania Company v. Stegemeier*, 10 Am. St. R. 136; *Coulter v. American Express Company*, 56 N. Y. 585, also 5 Lans. 67.

⁶ *Stokes v. Saltonstall*, 13 Peters (U. S.) 181; *Twonley v. Central Park Railroad Company*, 69 N. Y. 158.

act, but the consequence of a third person's wrongful act, *and* done in the effort to avoid injury to himself.¹ A further aspect of the same principle is given in *Barton v. Springfield*,² where the facts shewed that as the plaintiff was walking along the street, she was frightened by the attempt of a man to molest her, and in her eagerness to escape fell into a hole, that was negligently left in the side way, but of whose existence she was well aware. It was sought to disentitle her to recover on the ground of contributory negligence. The Court held that previous knowledge of a defect, though always an important and often a decisive circumstance in a case, was not necessarily conclusive; since "it is not required that the traveller's thoughts should be constantly on the condition of the way over which he passes or its want of repair," and that, in cases like the present, fright would justify a momentary forgetfulness of the remoter danger, so as not to disentitle a plaintiff to recover for the defendant's neglect.³

Previous knowledge of defect not conclusive.

Lord Blackburn also emphasizes this principle while he defines its limits in his opinion in the House of Lords in *The Khedive*;⁴ alluding to the judgment of Brett, L.J., in the Court of Appeal, he says: "I agree also in what he (Brett, L.J.) says, that a man may not do the right thing, nay, may even do the wrong thing, and yet not be guilty of neglect of his duty, which is not absolutely to do right at all events, but only to take reasonable care and use reasonable skill; and I agree that when a man is suddenly and without warning thrown into a critical position due allowance should be made for this, but not too much. If, to take the example Lord Justice James gives, the driver of a van cracking his whip makes the horses of a carriage suddenly unmanageable, the fact that the driver of the carriage pulled the wrong rein would be much less cogent evidence of want of reasonable skill or of reasonable care on his part, than if he did the same thing when driving along in the ordinary way, but it would still be evidence." The same principle was acted on in *St. Louis, &c. Railway Company v. Murray*,⁵ an action by a

Lord Blackburn's statement of principle in *The Khedive*.

¹ *Holmes v. Mather*, L. R. 10 Ex. 261; *Lowery v. Manhattan Railroad Company*, 99 N. Y. 158, should particularly be referred to. In *Wakeman v. Robinson*, 1 Bing. 213, the facts shew "that the defendant in his alarm pulled the wrong rein." Messrs. Shearman and Redfield, Neg. § 19 n. 1, are of opinion that on this account the decision is not to be supported, since the defendant acted under sudden terror; yet even if this were so, "the accident was clearly occasioned by the default of the defendant," who would therefore be liable for putting himself in such circumstances.

² 110 Mass. 131.

³ *Cp. Reg. v. Pitts*, Car. & Mar. 284. Where A by the wrongful act of B loses his presence of mind, and in consequence runs into danger and receives an injury from act of B, the latter is not protected even though he gave warning to A immediately before the accident: *Woolley v. Scovell*, 3 Man. and Ry. 105.

⁴ 5 App. Cas. 876, at 891.

⁵ 29 Am. St. R. 32.

passenger to recover damages for an injury received in leaping from a railway train to avoid a threatened peril, which it was admitted would have passed by harmlessly had the passenger quietly remained where he was. It was there held that the opinions, declarations and acts of other passengers at the time are admissible in evidence to show how the situation appeared to the person injured and to his fellow-passengers, and that he acted as a man of ordinary prudence would have acted in the same circumstances.

Unconscious
agents.

(3) Closely akin to constrained agencies are unconscious agencies.

Thomas v.
Winchester.

What the position of an intermediate unconscious agent between two conscious agents is, in law, is illustrated by a leading American case, *Thomas v. Winchester*.¹ The plaintiff's wife being ill, plaintiff purchased what was believed to be the medicine prescribed, from a store of a druggist; the druggist had purchased it of a dealer in New York, the man in New York bought it of defendant. The jar from which the medicine was taken was labelled as " $\frac{1}{2}$ lb. of dandelion prepared by A. Gilbert, 108, John St., N.Y. Jar 8 oz."; at which address, and under the name of Gilbert, the defendant carried on business. The contents of the jar proved to be belladonna, and the plaintiff's wife was seriously injured by taking it. The judge charged the jury that if either of the intermediate druggists was guilty of negligence in not inquiring more particularly into the contents of the jar, the plaintiff was not entitled to recover. The jury found they were not any of them guilty of negligence. The Court of Appeals declined to decide whether the dealer from whom the plaintiff immediately purchased, was justified in selling the article on the faith of the defendant's label. The Court held that so far as the plaintiffs were concerned, it did not lie in the mouth of the defendant to aver the negligence of the intermediate salesmen, and thereby to avoid the consequences of his own neglect; and that the plaintiff could recover. Had any such duty to test the article sold existed on the part of the intermediaries, it could not have been said that the injurious result to the plaintiff's wife

¹ 6 N. Y. 397, and Bigelow, L. C. on Torts, 602. There are many cases which establish that the act of an *unconscious agent* is the act of the party who sets him in motion: per Alderson, B., *Langridge v. Levy*, 2 M. & W. 519, at 525. *Davis v. Guarnieri*, 4 Am. St. R. 548, is also a case of the negligent sale of poison by a druggist whereby plaintiff's wife was injured. In *Blood Balm Company v. Cooper*, 20 Am. St. R. 324, the medicine sold was not a deadly poison and no label was affixed calculated to deceive, yet the vendor to the druggist who sold it was held liable. In *Dalziel v. Osborne*, 20 Dunlop 55, the case of a tradesman supplying through ignorance or carelessness a deadly poison in place of a salutary medicine, a defence that he had only undertaken to procure the medicine from another party, was held maintainable.

would certainly have followed; and if the intermediate chemists had a duty of examination, their failure to discharge the duty would have absolved all antecedent agents; for subsequently to their neglect, there would have been the intervention of an independent volition. In which case the neglect of the defendant was not the cause of the injury; since had it only been his neglect the spurious article would never have reached the plaintiff's wife; but the subsequent neglects directed the injurious agency, otherwise innocuous, against her. The train which events follow seems to be—A sets B in motion; C receives B from A. If C does his duty he arrests any irregular effects of A's action on B; if C is negligent he either gives an additional impulse to them, or produces an original irregular effect. C transmits B to D. If D does his duty he arrests any irregular effects of A's or C's actions; if D is negligent he again either accelerates the existing effects, or produces new ones himself; so that if there is no duty upon either C or D to do more than transmit—if they are mere conduit pipes—A, who sets B in motion is liable all through, on the ground that no new force has intervened. There has been a mere transmission of the effects of his originally wrongful act. If there is a duty of examination on C and D, it is difficult to see any principle on which their negligence can be condoned, and A be made liable, which would not, at the same time, land us in obvious absurdities; for the act of A is innocuous but for the subsequent neglect of C or D or both. If the neglect is simultaneous there is a difference.

Sequence of
causes.

The law, then, as laid down by the judge in charging the jury, seems the correct rule. And the jury having found that neither of the intermediate agents was more than an irresponsible conduit, the decision on that assumption is a right one.¹ Brett, M.R., as reported in *Heaven v. Pender*,² seems to doubt its correctness; but it is obvious on reference to the authority to which he refers for the facts of the case, that the direction of the judge of first instance was not before him: and that his doubts are confined to the decision of the Court of Appeals.³ While, on the one hand, one knowingly putting on the market a death-dealing fluid cannot claim immunity, because he sent it through many

Correct
principle.

¹ See, too, *Brass v. Maitland*, 6 E. & B. 470; *Farrant v. Barnes*, 11 C. B. N. S. 553.

² 11 Q. B. Div. 503, at 514.

³ A similar view of the law to that taken in the text and giving the go-by to the view of the Court of Appeals, is taken by Gray, J., in *Wollington v. Downer Kerosene Oil Company*, 104 Mass. 64, 68, who limits the druggist's liability to the case where "there is no negligence on the part of the intermediate sellers or of the person injured." The cause of action was selling naphtha without giving notice of its dangerous qualities.

hands;¹ on the other, a person who knowing the perilous character of a compound which he has bought, yet hands on the compound to a third person, destroys, by his negligent act, the causal connection between the first person concerned and the ultimate injury sustained.² Of course this immunity, by reason of absence of negligence, only holds good in actions *ex delicto*; in actions *ex contractu* the contractual relation binds the defendant to the performance of his contract, whatever it is, even if the wrong or injury is the work of an intermediary.³

Distinction
between goods
supplied by
maker and
goods indi-
cated by a
trade mark.

A distinction may be noted here also. The contract may be either for some article supplied by the vendor out of his ordinary stock, or for some special brand obtainable only from the maker. If, for example, bottled beer were ordered and vitriol by mistake supplied, the seller would not only not have performed his contract, but would have rendered himself liable besides for any damages caused by his mistake. If, however, Bass's bottled ale being ordered, the vendor obtained properly labelled bottles from the proper source,⁴ which in the result proved to contain vitriol, from tasting which the purchaser was seriously injured, there would seem to be a difference in the vendor's liability. He would not have supplied Bass's bottled ale, and so on the principle of *Wieler v. Schilizzi*,⁵ the purchaser would be entitled to reject the article; or if he had paid for it to recover the price as money had and received for his use,⁶ and also, if there were a warranty in the sale, damages arising as a natural consequence;⁷ though not if the contract, as seems most probable, were held to be fulfilled by supplying an article authenticated by Bass, or the bottler, as their bottled beer. Setting this point aside, the case now put differs from the other case in the circumstance that though the vendor might be liable for the price, he would not be liable for the serious consequences of the mistake. Since not only is there no duty on him to examine and satisfy himself that what he sells is Bass's bottled beer,⁸ but the very act of breaking the label would be a breach of

¹ Per Agnew, C.J., *Elkins v. McKean*, 79 Pa. St. 493, 502.

² *Carter v. Towne*, 103 Mass. 507; see also 98 Mass. 567; *Wellington v. Downer Kerosene Oil Company*, 104 Mass. 64.

³ *Burrows v. March Gas Company*, L. R. 5 Ex. 67 Ex. Ch. L. R. 7 Ex. 96; *Eaton v. Boston, &c. Railroad Company*, 93 Mass. 500.

⁴ The case of a patent medicine with a Government stamp affixed is even stronger.

⁵ 17 C. B. 619; *Randal v. Newson*, 2 Q. B. Div. 102.

⁶ *Chanter v. Hopkins*, 4 M. & W. 399.

⁷ *Smith v. Green*, 1 C. P. D. 92; 56 & 57 Vict. c. 71, s. 53; *Jones v. Just*, L. R. 3 Q. B. 197; *Jones v. Padgett*, 24 Q. B. D. 650.

⁸ The Merchandise Marks Act, 1887, 50 & 51 Vict. c. 28, s. 17, does not imply a warranty of the beer, but only that the "mark is a genuine trade-mark and not forged or falsely applied"; as to this last see s. 5, sub-s. 3; and that the trade description is not a false trade description, see s. 3, sub-s. 1. Cp. *Burnby v. Bollett*, 16 M. & W. 644; *Emmerton v. Matthews*, 7 H. & N. 586; *Smith v. Baker*, 40 L. T. 261. See Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, s. 14, and *Ward v. Hobbs*, 4 App. Cas. 13.

his duty and destroy the value of the commodity he was to supply.¹

*Cramb v. the Caledonian Railway Company and Another*² must be noted in this connection. It was an action brought against carriers and a grocer in respect of death caused by eating poisoned sugar. The sugar had been delivered to the Caledonian Railway Company as carriers; they had packed it in proximity to some weed-killer they were carrying, the properties of which they were ignorant of. When the sugar was delivered it was wet; this was shewn to be a usual incident in the carriage of sugar, and not necessarily injurious. The grocer, to whom the carriers delivered it, sold some to a person, in respect of whom the pursuer sued. After eating of the sugar those partaking were very seriously affected, and two of them died in consequence. It then appeared that the weed-killer was an arsenical preparation, the exudation from which poisoned the sugar. The consignors of the weed-killer consented to pay damages, but the Court was of opinion that neither the grocer who sold the sugar nor the carriers were liable in the absence of knowledge or means of knowledge of the injurious ingredients of the weed-killer. This decision seems correct when tested by the principles of English law.

*Cramb v.
Caledonian
Railway
Company.*

The principle that to fix liability for injuries brought about through a complicated state of facts, the last conscious agency must be sought; and the consideration that, if, between the agency setting at work the mischief and the actual mischief done, there intervenes a conscious agency, which might or should have averted mischief, the original setter in motion of the mischievous agency ceases to be liable, afford the clues for the unravelling the cases. On the other hand, it must be borne in mind that, though there may intervene various stages in the development of the mischief, yet, if none of these is due to a conscious volition, the last conscious agent continues to be liable.

Principle of liability that the last responsible agency is to be sought.

*Heaven v. Pender*³ is the best known of the English cases bearing on this point. A dock owner supplied and put up a staging as incident to the use of his dock, so that vessels coming to the dock might be painted and repaired. The ropes by which the staging was slung were scorched and unfit for use, and were supplied without a reasonably careful attention to their condition. The plaintiff was a ship-painter working under an employer who

*Heaven v.
Pender.*

¹ The purchaser could sue the bottler on the warranty contained on the label and recover all damages; though this was not decided in *George v. Skivington*, L. R. 5 Ex. 1, it was in *Blood Balm Company v. Cooper*, 20 Am. St. R. 324.

² 19 Rettie 1054.

³ 11 Q. B. Div. 503; 9 Q. B. D. 302. Cp. *King v. Great Western Railway Company*, 24 L. T. N. S. 583.

Ground of the
decision of the
majority.
Cotton and
Bowen, L.JJ.

Brett, M.R.'s,
proposition.

Suggested
ground of
the decision.

had a contract with the shipowner to paint his ship in dock. When the plaintiff began to use the stage the rope broke, the stage fell, and the plaintiff was injured. He brought his action against the dock owner. A Divisional Court held that as there was no contract between plaintiff and defendant, no fraud on the defendant's part, and no breach of duty to tell the truth, the defendant was entitled to judgment. The Court of Appeal reversed this judgment; Cotton and Bowen, L.JJ., on the ground that "the dock owner was under an obligation to take reasonable care that at the time the appliances provided for immediate use in the dock were provided by him they were in a fit state to be used—that is, in such a state as not to expose those who might use them for the repair of the ship to any danger and risk not necessarily incident to the service in which they were employed."

Brett, M.R., formulated the proposition, that "whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." This proposition was not concurred in by the other judges, and Cotton, L.J., cites cases which he regards as impliedly negating it.

It is submitted that the principle underlying the decision in *Heaven v. Pender* is, that the dock owner, having undertaken to supply the staging, thereupon undertook the obligation to supply a fit staging, which obligation the plaintiff was justified in assuming he would discharge.¹ Had there been a duty on the shipowner or on the ship-painter to examine the staging, the chain of connection between the plaintiff and the dock owner would have been broken. The decision must, therefore, be taken to imply that there was no duty on the part of any one, subsequent to the dock owner, to test the staging supplied; but that, when the dock owner undertook to supply staging, there was an obligation that the staging supplied should be reasonably fit for the purpose for which it was to be used;² so that those coming to use it might trust to the performance of the dock owner's duty without any

¹ *Edwards v. Hutcheon*, 16 Rettie 694, is a Scotch case illustrating the same principle. A person knowingly supplying a defective dangerous machine is liable to those injured by it, who in the ordinary course of their duty have to work the machine in the circumstances of danger he has created. The case, however, was apparently decided on the contract to furnish a reasonably fit machine, which was not performed, whereby the farmer, the contracting party, was injured through the injury done to his daughter. See remarks of the judges as to the difference of English law.

² *Randall v. Newson*, 2 Q. B. Div. 102.

independent examination of their own. The difficulty of the case is to determine between those cases where the obligation to inquire arises, and those cases where there is no such obligation; and the presence or absence of this obligation, in each case, marks the intervention of that new conscious agency or its absence which discriminates whether the right of action exists in the original negligent person or is diverted. Tried by this test the cases are entirely consistent, as may be shewn by an examination of them.

In *Langridge v. Levy*,¹ the father of the plaintiff bought a gun of the defendant for the use of himself and his sons. The defendant fraudulently warranted the gun to have been made by a celebrated gunmaker. The plaintiff used it; it exploded and injured him. On suing the defendant, the plaintiff recovered on the ground that, as there was "fraud and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured." Having the result of the professional knowledge of the vendor to act on, the plaintiff was not bound himself to test the gun, and might rely on the representation of the vendor. If this were so, the fraud of the vendor was an expression larger than was necessary to state the true ground of the decision, that the conduct of the gunmaker was such as to absolve the plaintiff's father and the plaintiff from making any independent inquiry; and since there was no call for an independent volition to intervene between him and the accident, and none in fact did intervene, the liability for the consequences could be referred back to him. Langridge v. Levy.

The principle underlying the decision is more apparent from the next case, that of *Longmeid v. Holliday*.² The defendant, a lampseller, sold a lamp called the Holliday patent lamp to the plaintiff for the purpose of being used by him and his wife. The lamp was defectively constructed, though the defendant was not aware of its defects; and the jury found that he was not guilty of any fraudulent or deceitful representation, but sold the lamp in good faith. In using the lamp it exploded, and plaintiff's wife was injured. The Court of Exchequer held that no action lay. "It would be going too far," Longmeid v. Holliday.

¹ 2 M. & W. 519, 4 M. & W. 337; *Pilmore v. Hood*, 5 Bing. N. C. 97. For the principles to be extracted from Parke, B.'s, judgment in *Langridge and Levy*, see the discussion of the case and the judgments of Wood, V.C., in *Barry v. Croskey*, 2 J. & H. 1, 17, 22. See, too, *Gerhard v. Bates*, 2 E. & B. 476, 491.

² 6 Ex. 761, 29 L. J. Ex. 430. Both the reports state that the evidence was that the lamp "was sold to the plaintiff's wife for the purpose of being used by him and his wife." The declaration, however, states that it was sold to the plaintiff himself. See 56 & 57 Vict. c. 71, s. 14.

said Parke, B., "to say that so much care is required in the ordinary intercourse of life between one individual and another, that if a machine, not in its nature dangerous—a carriage, for instance—but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care—should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it." The lamp, without fraud, is handed from one person to another, and there is no consciousness of any defect; while the duty of inquiring is negatived. So the defendant is not liable because he is a mere conduit pipe, and has not been required to exercise any independent volition in the matter.

Winterbottom
v. Wright.

Winterbottom v. Wright¹ is the next case. Defendant contracted with the Postmaster-General to provide coaches to convey the mails. One Atkinson was under contract with the Postmaster-General to supply horses and coachmen for the coaches so supplied, and to use no others. The plaintiff was hired by Atkinson as one of the coachmen. Through failure of the defendant to perform his contract properly, the plaintiff was injured and brought his action. The Court of Exchequer were agreed that the plaintiff could not recover. Lord Abinger, and Alderson, B., on the unsatisfactory ground that unless the operation of such contracts was confined "to the parties who entered into them the most absurd and outrageous consequences, to which I see no limit, would ensue;" and Rolfe, B., on the ground that "there was no duty to the plaintiff from the defendant."

Considered.

It cannot be contended that the mere fact of the existence of a contract between a coachbuilder and a customer, involves the devolution of all responsibility for negligence in the construction of the coach, as between the customer and any people injured by the use of the coach, upon the coach-builder. Failing this there is a duty of inquiry upon the customer to see that the coaches supplied him are fit to be used without damage to people generally. This intervention of the conscious volition accordingly prevents the liability being thrown further back. In this particular case no action could be maintained against the Postmaster-General, apart from a *personal* duty to inspect;² though, as a rule, the action can be brought against any person whose neglect of the duty of examination occasions the accident.

¹ (1842) 10 M. & W. 109. See Roddy v. Missouri Pacific Railway Company, 24 Am. St. R. 333.

² Whitfield v. Lord le Despencer, Cowp. 754.

The principle of *Winterbottom v. Wright* is clearly enunciated in an American case, *Heizer v. Kingsland and Douglas Manufacturing Company*;¹ there it is laid down that one who makes and sells a piece of machinery is not liable to persons other than the vendee for injuries caused by its breakage, unless such machinery is of an inherently dangerous character, and the maker has failed to make known its true nature; or has sold it, knowing it to be defective, without informing the vendee of the defect. The fact that the defendant must be charged with the knowledge, that the machinery would be worked by other people, is not in itself a sufficient reason for holding the vendor liable to them for the consequences of mere negligence, on his part, in using poor materials or putting them together unskillfully.²

Heizer v. Kingsland and Douglas Manufacturing Company.

George v. Skivington,³ so far from being contradictory of *Winterbottom v. Wright*, is only the natural outcome of the same principle, not indeed distinctly enunciated, yet involved in Rolfe, B.'s, ground of decision that there was no duty on the defendant. Plaintiff purchased a chemical hairwash for his wife, which proved extremely deleterious, and produced injury to her health. The Court of Exchequer held an action on behalf of the wife maintainable. The profession of a special skill by the defendant, and the description of the hairwash as a chemical composition, which implied that ordinary persons would be unable to test it, even if desirous to do so, were circumstances that exonerated the plaintiff from the duty of any independent examination in the matter. Had the case gone to a jury, the judge would probably have asked them whether they considered the plaintiff or his wife should have inquired into the constitution of the chemical that was given them. The decision was, moreover, on demurrer, and cannot be held to establish more than that such a state of facts as is set out in the declaration raises no necessary implication that the plaintiff or his wife had a duty to examine the goods supplied them; and that, failing a finding of the jury to the contrary, they are presumed to be justified in not exercising their independent judgments in the matter, and in trusting to the chemist who supplied them.⁴

George v. Skivington.

Considered.

¹ 33 Am. St. R. 482, at 486.

² As to implied conditions as to quality or fitness between the parties, 56 & 57 Vict. c. 71, s. 14.

³ (1869) L. R. 5 Ex. 1. See, too, *Pippin v. Sheppard*, 11 Price, 400; *Gladwell v. Steggall*, 5 Bing. N. C. 733; and *Stretton v. Holmes*, 19 Ont. R. 286.

⁴ *Blackmore v. Bristol and Exeter Railway Company*, 8 E. & B. 1035, was a case much discussed in *Heaven v. Pender*; where the majority of the Court say, "whether the Court was right in *Blackmore's* case in treating the plaintiff as a volunteer may be a question. But as the ground of the decision is that he was so, that circumstance prevents the case being an authority inconsistent in principle with the conclusion." The position of a volunteer is such that he can impose no greater obligation on the master than if he were in his actual employ: *Potter v. Faulkner*, 1 B. & S. 800.

Corby v. Hill.

Corby v. Hill¹ belongs to another class of cases cited in Heaven v. Pender, and which can be referred to the same principle now under consideration. An obstruction was placed on a private road leading to a house; and the plaintiff while using the road and going to the house, was injured by the obstruction. The Court of Common Pleas held that he could recover. The opening the road was an intimation that it did not differ from the ordinary condition of similar roads; the placing the obstruction was the negligent act of a conscious agent that, till counteracted by some subsequent voluntary agency, rendered the actor liable for the consequences. So, too, in Indermaur v. Dames.² The premises were not in the condition of an ordinary safe warehouse, though they ought to have been. The neglect to take some step to make their condition, with regard to strangers lawfully doing business there, of such safety that no greater than ordinary care would be required to avoid accident was the negligent act whence flowed the liability. No conscious volition intervened between the negligent act and the accident, and those responsible for the negligence were liable.

Indermaur v.
Dames.

Smith v.
London and
St. Katharine
Docks
Company.

This is also the explanation of Smith v. London and St. Katharine Docks Company.³ A dock company provided gangways, for persons having business with the ships in their docks, which afforded the only access to the vessels therein. The plaintiff passed over the gangway to a ship in the dock in safety. Before he returned, it had been rendered unsafe by the defendants' servants, and in returning plaintiff was injured. Assuming the plaintiff's right to pass on to the ship (and if he had no such right he would come under a different principle)⁴ he was entitled to assume that the means of ingress and egress provided were suitable. The negligent act causing liability was the interfering with the condition of the gangway so as to render it insecure, and was the last act of a conscious volition previous to the accident; hence a liability on those responsible for it.

Gautret v.
Egerton.

Gautret v. Egerton⁵ illustrates the other side of the rule. It was sought in that case to shew a duty on canal proprietors to keep the bridges and paths of their canal in a safe condition for the benefit of all who chose to go along them and were not hindered by the canal authorities. The Court held that the declaration was

¹ 4 C. B. N. S. 556.

² (1866) L. R. 1 C. P. 274, L. R. 2 C. P. 311.

³ (1868) L. R. 3 C. P. 326; Campbell v. Morrison (1891), 19 Rettie 282.

⁴ (1862) Bolch v. Smith, 7 H. & N. 736.

⁵ (1867) L. R. 2 C. P. 371. In Bulman v. Furness Railway Company, 32 L. T. N. S. 430, a distinction was drawn between the passive negligence alleged in Gautret v. Egerton and "active negligence" as alleged in this case; and a declaration was held good on demurrer which stated that plaintiff was "lawfully" in the place where he sustained injury by an act of "active negligence" on the part of the defendants.

demurrable, because there was no allegation that the canal proprietors *did* anything to make the place dangerous; and mere licensees must take the places they visit as they find them. There was no conscious volition, and so no liability.

The next case is *Collis v. Selden*; ¹ an action was brought against the defendant (apparently a fitter) for negligently hanging a chandelier in a public-house. The plaintiff was in the public-house—in what character did not appear from the declaration—and was injured by the fall of the chandelier. The Court held he could not recover. He might have been a guest, and that alone would not give him a cause of action; ² and, further, no breach of duty was shewn. The proprietor might, consistently with the declaration, have contracted with the plaintiff for a certain kind of fitting, or that it should be put up in a merely temporary manner. At any rate, assuming the householder's liability, there is a duty on every householder to see to the state of his own premises; ³ and between the wrongful act of the fitter (if indeed his act was wrongful) and the injury to the plaintiff, there was the opportunity for the intervention of the conscious volition of the proprietor, and, may be, a duty on him to intervene; thus on this, if on no other ground, the plaintiff could not recover.

*Collis v.
Selden.*

Francis v. Cockrell ⁴ may be cited in further confirmation of this principle. A stand was erected by contractors for the defendant, who let out seats there for hire; the construction of the stand was improper and negligent, though there was no want of care on the part of the defendant, and there was no evidence that if he had inspected it he would have found the defect. The stand fell: the plaintiff was injured, brought his action and recovered. Hannen, J., after saying there was no distinction between the liability of the defendant and that of a carrier of passengers, goes on: "The passenger does not know whether the carrier has himself manufactured the means of carriage or contracted with some one else for its manufacture. If the carrier has contracted with some one else, the passenger does not usually know who that person is, and in no case has he any share in the selection. The liability of the manufacturer must depend on the terms of the contract between him and the carrier, of which the passenger has no knowledge, and over which he can have no control; while the carrier can introduce what stipulations and take what securities

*Francis v.
Cockrell.*

Judgment of
Hannen, J.

¹ (1868) L. R. 3 C. P. 495.

² *Southcote v. Stanley*, 1 H. & N. 247.

³ For the defective repair of "premises let to a tenant, the occupier and the occupier alone being *prima facie* liable," per Lopes, J., *Nelson v. Liverpool Brewery Company*, 2 C. P. D. 311, 313.

⁴ (1870) L. R. 5 Q. B. 184 and 501.

he may think proper. For injury resulting to the carrier himself by the manufacturer's want of care, the carrier has a remedy against the manufacturer; but the passenger has no remedy against the manufacturer for damage arising from a mere breach of contract with the carrier." The duty of the defendant to the plaintiff raised an implied warranty that due care had been used in the construction of the stand. By letting out the work he, in a manner, subdivided his responsibilities without affecting the total of them. For all his own acts he remained as liable as if he himself had done the work. In addition, his undertaking was that the contractors should not fall short of the standard his own work was bound to reach. He had a duty to test the whole. The failure of the contractor's work was the breach of duty from which damage arose; and, the defendant being responsible for it, the plaintiff rightly recovered.

*M'Gill v.
Bowman.*

The same principle explains the Scotch case of *M'Gill v. Bowman*,¹ where Lord Young says: "If I have painters to work in my house and undertake to supply ladders to the master's satisfaction and do so, am I subject to an action by one of the painters if the ladders prove too weak? Surely not. I think that would be an entirely erroneous proposition," because the contract is to supply ladders to be approved. The approval implies examination; the person supplying is, therefore, not necessarily bound to the supplying of safe ladders, but only of ladders to satisfy the person with whom his contract is. If that person afterwards uses them in circumstances for which they are unsuitable, his act of examination is the work of a conscious agency which intercepts the consequences of previous acts. All the cases appear to turn on the duty devolving on the person last in charge of the machinery or article from defect in which the injury sued on immediately arises. If such person undertakes in law no duty of examination, and is entitled to hand on the machinery or article in the state in which he has received it from some one antecedent to himself, the liability for the injury is, so to speak, thrown back. If, on the other hand, such person has a duty to examine, neglect of it produces liability.

*Robertson v.
Fleming.*

The case of *Robertson v. Fleming*,² in the House of Lords, at first sight may not seem to accord completely with our principle. "I never had any doubt," says the Lord Chancellor³ there, "of the unsoundness of the doctrine that A employing B, a professional lawyer, to do any act for the benefit of C, A having to pay

¹ 18 Rettie 206, at 211.

² 4 Macq. 167; *Tully v. Ingram*, 19 Rettie 65.

³ Lord Campbell; the rest of the Court, consisting of Lords Cranworth, Wensleydale, and Chelmsford, approved.

B, and there being no intercourse of any sort between B and C, if through the gross negligence or ignorance of B in transacting the business C loses the benefit intended for him by A, C may maintain an action against B and recover damages for the loss sustained." The principle, however, determining the right of action is that every man has a property in life, liberty, estate, and reputation, so that if these are violated the law gives a remedy.

But the law does not recognise expectations, except so far as they have their root in property.¹ Thus, says Comyns:² "An action upon the case does not lie when there is not any temporal damage: as against a woman who pretends herself single, and inveigles a man into a marriage, whereby he was disturbed in conscience. Nor does it lie for refusing to administer the sacrament; nor for not reading divine service to him and the tenants of his manor. Nor for a legacy, for it is only one by the spiritual law." The benevolent intention of a testator to a legatee does not raise in the legatee any legal right whatever; for the legatee has received no injury to person, property, or right, apart from a probability that, if the course of things had been other than it actually turns out, a right would have vested in him. The law draws the line at a vested right, and will not entertain expectations of rights as importing obligations.³ Neither person nor property is injured, only hopes or calculations; there is no contract between the person injuring and the person injured, and no fraud.

Law does not recognize expectations, except so far as they have their root in property.

Hawkins, J.,⁴ in *Thrussell v. Handyside*, cites with approbation Brett, M.R.'s, proposition; though for the decision of the case, in the learned judge's view of the facts, it was sufficient to say that a dangerous business was being carried on without precaution, and injury resulted. In which case in any view there would be a liability; since it is undoubted that a dangerous business is not to be carried on with a neglect of any reasonable precautions. In the earlier case of *Elliott v. Hall*,⁵ the Court seems studiously to avoid the invitation to adopt the principle laid down by the Master of the Rolls, at least with any of the width of interpretation of which the language is susceptible. Defendant, a colliery owner consigned coals sold by him to the buyers by rail in a truck rented by him from a waggon company for the

Thrussell v. Handyside.

Elliott v. Hall.

¹ "It is sufficient to say that no one can maintain an action unless there is some injury to something to which the law recognises his title": per Cotton, L. J., *Hurdman v. North-Eastern Railway Company*, 3 C. P. Div. 168, 175. Com. Dig. Action, A 2. *Ashby v. White*, 1 Smith L. C. (9th ed.) 268.

² Com. Dig. Action on the Case, B. 1.

³ *Cp. Rogers v. Rajendro Dutt*, and others, 13 Moore P. C. C. 209.

⁴ 20 Q. B. D. 359, at 363.

⁵ 15 Q. B. D. 315.

purposes of the colliery. Through the negligence of the defendant's servants the truck was allowed to leave the colliery in a defective state. In consequence of the defect in the truck, injury was caused to the plaintiff, one of the buyer's servants, who was employed in unloading the coal. The Court held the plaintiff entitled to recover, "quite independently of the decision of the Court of Appeal in *Heaven v. Pender*;" because "it was clearly part of the contract for the sale of the coal to the plaintiff's employer that it should be conveyed in a truck to the buyer's, and it must necessarily have been contemplated that, when it arrived at its destination, the truck would be unloaded by the buyer's servants, I think that it is plain that under these circumstances a duty arose on the part of the defendant towards the plaintiff. If vendors of goods forward them to the purchasers, and for that purpose supply a truck or other means of conveyance for the carriage of the goods, and the goods are necessarily to be unloaded from such means of conveyance by the purchaser's servants, it seems to me perfectly clear that there is a duty on the part of the vendors towards those persons who necessarily will have to unload or otherwise deal with the goods to see that the truck, or other means of conveyance, is in good condition and repair, so as not to be dangerous to such persons."¹

*Coughtry v.
Globe Woollen
Company.*

In the new York Court of Appeals, some years previously to the decision in *Heaven v. Pender*, it may be noted that a case² was decided on facts very similar to those in *Heaven v. Pender*, and in the same way, without resorting to any such proposition as that suggested by Brett, M.R. A scaffold was erected by the defendant upon his own premises for the express purpose of accommodating workmen engaged under a contract to do work there. A workman of the contractor, while using the scaffold, fell, by reason of its negligent construction, and was killed. His representatives sued for damages for his death. A nonsuit was entered at the trial, and affirmed by the general term of the Supreme Court. The Court of Appeals unanimously reversed this, and ordered a new trial, on the ground that the defendant actually furnished the scaffold for the express purpose of enabling and inducing the men, who were to do the work, to go upon it; and as it was erected by the defendant, was in his possession, and was in use on his premises, with his permission, for the very purpose for which it had been furnished, and by the persons for whose use it had been provided, a duty was raised thereby to those who were

¹ Per Grove, J., 15 Q. B. D. at 319.

² *Coughtry v. Globe Woollen Company* (1874), 56 N. Y. 124. See *Horne v. Meakin*, 115 Mass. 326.

rightfully using it. This almost in terms conforms to the test already suggested, that between the time when the defendant last exercises control, and the time of the occurrence of the accident, there is no interval in which a new conscious agency operates.

The supposed canon of Brett, M.R., has however been accepted in the United States as "accurately expressed;"¹ and a disposition has been shewn there to adopt the entire breadth of signification of which the expression of this generalization is capable; yet, to judge from Messrs. Shearman and Redfield's book, without an appreciation of what was sought to be enunciated. They say:² "As it is admirably put by Mr. Horace Smith, 'The true question always is, has the defendant committed a breach of duty apart from contract? If he has only committed a breach of contract he is liable to those only with whom he has contracted; but if he has committed a breach of duty he is not protected by setting up a contract in respect of the same matter with another person.' This principle is not stated positively in any decision or judicial opinion, except the masterly opinion of Lord Esher in *Heaven v. Pender*, which was not concurred in by a majority of the Court." It may be pointed out, however, that the majority of the Court did not withhold assent from the proposition, that breach of contract imports liability; nor from the proposition, that if a man has been guilty of a tort he is not protected from its consequences by reason of having a contract in the same matter. The proposition the majority of the Court would not accept, was rather that the test of breach of duty towards the world at large, is, whether ordinary people of ordinary prudence could foresee injury as likely to arise from conduct.³

The true limits of *Heaven v. Pender*⁴ are indicated with the greatest authority by the Court of Appeal in *Le Lievre v. Gould*;⁵ the only principle laid down therein is explained to be that a duty to take due care arises when the person or property of one is in such proximity to the person of another, that if due care be not taken damage may be done by the one to the other; though, as Smith, L.J., observed,⁶ the case "is often cited in support of all kinds of untenable propositions." Lord Esher, M.R.'s, statement of the true ground of the decision of *Heaven v. Pender* may with advantage be cited at length after the numerous glosses⁷

¹ *Wabash, &c., Railroad Company v. Locke*, 2 Am. St. Rep. 193, at 199; *Harriman v. Pittsburg, &c., Railroad Company*, 4 Am. St. Rep. 507, 518.

² Negligence, § 116.

³ *Cp. Dickson v. Reuter's Telegraph Company*, 3 C. P. D. 1.

⁴ 11 Q. B. Div. 503.

⁵ (1893) 1 Q. B. 491.

⁶ (1893) 1 Q. B. 491, at 504.

⁷ *E.g.*, *Cann v. Wilson*, 39 Ch. D. 39.

Lord Esher,
M.B.'s, state-
ment of the
effect of
Heaven v.
Pender.

that have been put on that much cited case. The case of *Heaven v. Pender* "established that under certain circumstances one man may owe a duty to another even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property. For instance, if a man is driving along a road it is his duty not to do that which may injure another person whom he meets on the road, or to his horse or his carriage. In the same way it is the duty of a man not to do that which will injure the house of another to which he is near. If a man is driving on Salisbury Plain, and no other person is near him, he is at liberty to drive as fast and as recklessly as he pleases. But if he sees another carriage coming near to him immediately a duty arises not to drive in such a way as is likely to cause an injury to that other carriage. So too if a man is driving along a street in a town a similar duty not to drive carelessly arises out of contiguity or neighbourhood. That is the effect of the decision in *Heaven v. Pender*."¹

Comment.

This explained, *Heaven v. Pender* falls in with the current of decisions, establishing that, where the act of one person or his user of his property naturally and necessarily, if not diverted, works injury to another person, such person, by so acting or so using his property, incurs a liability to the other; and that, where a person leaves about or uses an instrument which is dangerous in itself or may become so and another is injured thereby, he is under a liability to such other. In the absence of contract or fraud we may note one man is not liable to another for injury sustained by such other from reliance on his acts or words. A man places a plank across a stream for his own purposes; another uses it and falls into the stream because it is insecurely placed; there is no liability. One man publicly expresses his intimate confidence that certain securities are a first-rate investment, whereby another hearing him invests on the faith of the correctness of his opinion and loses his money. The statement creates no liability. There is liability if one man leaves a pail of dangerous chemical on the highway which another accidentally stumbles over and a third man is injured by it. "If," says Willes, J., "a person undertakes to perform a voluntary act he is liable if he performs it improperly, but not if he neglects to perform it. Such is the result of the decision in the case of *Coggs v. Bernard*."²

¹ (1893) 1 Q. B. 493, at 497. See also per Bowen, L.J., 502.

² *Skelton v. London and North-Western Railway Company*, L. R. 2 C. P. 631, at 636.

To this class also belongs *Parry v. Smith*,¹ where Lopes, J., *Parry v. Smith* held that: "A duty attaches in every case where a person is using or is dealing with a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to bystanders. To support such a right of action, there need be no privity between the party injured and him by whose breach of duty the injury was caused, nor any fraud, misrepresentation, or concealment, nor need what is done by the defendant amount to a public nuisance." An escape of gas was the particular negligence complained of in *Smith v. Parry*. Now there is no absolute duty to prevent gas escaping from pipes under all conditions.² Gas is only greatly dangerous in a confined area; while a painting stage in certain positions, however extreme its dilapidation, might be entirely free from possibility of causing injury; and under other circumstances might be the means of causing equal injury with escaping gas. As the one becomes highly dangerous when escaping into a confined area, so the other, when used in a certain way, as, for instance, in the way it was used in *Heaven v. Pender*, becomes fraught with a similar danger, and, in the absence of a duty arising on the part of the person using it, carries with it a liability on those through whom it is used in its insecure condition.

O'Neil v. Everest,³ in the Court of Appeal, well brings out the principle contended for. It was decided on the ground of the intervention of a responsible agency between the negligence (assumed for the purposes of the decision) of the defendant and the particular neglect which immediately preceded the accident. The action was by a stevedore's man who received injuries by falling down into the cabin of a barge through the hatchway which had been left open. The defendant, in whose possession the barge was, had made a sub-contract with another man, who had control of the barge at the time of the accident. The breach of duty alleged was that the defendant had not provided a cabin top. It was pointed out in the Court of Appeal that in order to recover the plaintiff must show that the accident was the direct result of the defendant's breach of duty. "If," said Lord Herschell, C.,⁴ "the cover had been there and the hole was opened, it is admitted that the defendant would not have been liable. But if there was no negligence on the part of the defendant in the hole being left open supposing the cover to have been provided, it is difficult to see how there was negligence in not providing a cover for the hole." In other words, it was the duty of the person in charge

O'Neil v. Everest.

Lord Herschell, C.

¹ 4 C. P. D. 325.

² *Jackson v. Carshalton Gas Company*, 5 Times L. R. 69.

³ (1892) 61 L. J. Q. B. 453.

⁴ L. c. at 455.

of the barge, for whose acts or defaults the defendant was not responsible, to see that the hole was properly protected at the time of the accident; it was the neglect of this duty—the neglect by a responsible agent—and not by the defendant—of a duty that might have been performed in many ways without the existence of a cover—that caused the accident; and therefore the defendant was not liable. Yet, further, it might successfully have been contended that no duty was shewn to exist; it was not contended that the barge without a cabin cover was “inherently dangerous,” and there was no concealment. “Everybody accustomed to do anything on these barges knows perfectly well that there is a cabin, knows perfectly well that there is an opening by which access is obtained to that cabin, and knows perfectly well that even if there is a cabin-top it might not be on;”¹ and any one thus taking the risk is disentitled in the case of an accident happening to recover in respect of it.²

Guille v. Swan. Two American cases must be noted before leaving this matter of responsible agency. The first is *Guille v. Swan*.³ Defendant, who had gone up in a balloon, came down in plaintiff's garden. A multitude of persons rushed into the garden to see defendant and his balloon, trampled down the shrubs and flowers, and otherwise injured plaintiff's property. The New York Court held that the plaintiff could recover for the damage done. This decision does not seem sustainable, for it assumes the matter of fact, which should have been submitted to the jury, as decided against the defendant—that is, whether the act of the crowd in rushing into the garden and doing the mischief was the natural and probable consequence of the act of the defendant, and one which the defendant ought to have and might have foreseen. The defendant could not justly be made responsible for all the acts of the crowd; but for those only of which his own acts were the proximate exciting cause. What the impulses or deterrents urging or withholding persons from any definite line of conduct may be cannot be matter of law. Whether a subsequent act is the necessary sequence of a preceding one as matter of causation, or

¹ Per Cave, J., 61 L. J. Q. B. at 454.

² In *Loader v. London and India Docks Joint Committee*, 8 Times L. R. 5, the breach of duty alleged was the non-performance of a voluntary act, which was held not to import liability. Lord Esher, M.R., said that in order to recover the plaintiff would have to show “that he had been induced by the defendants to believe that they were going to do it (the act in question) again (though he doubted whether even that would render them liable)” —that is apparently without shewing all the ingredients in an action for false representation.

³ 19 Johns. (N. Y.) 381; *Gibney v. State*, 33 Am. St. R. 690. An attempt to assert a similar liability to that in *Guille v. Swan*, was made in *Scholes v. North London Railway Company*, 21 L. T. N. S. 835, and was supported by a reference to *The King v. Moore*, 3 B. & Ad. 184; but Keating, J., distinguishing the cited case on the ground that it was a case of indictment, refused to make the defendants “liable for the wrongful act of other persons.”

is merely subsequent in time without causal connection, is most generally matter for a jury, not matter of law; and on the determination of this precedent question the legal conclusions, as to which the judge directs the jury, depend. This was pointed out by Agnew, J., in the case of *Fairbanks v. Kerr*¹ in the Supreme Court of Pennsylvania, the second of the cases to be noticed. A man mounted a pile of flagging stones placed in the street, by the side of the way, in readiness to be used in the paving of the street, and delivered a political speech. A crowd of hearers gathered about, some of whom got on a heap of flagging stones, though not on the heap on which the speaker was standing, and broke them. The speaker was held not liable for the breakage on the ground that it was not a legal conclusion that he was liable for the trespasses of the crowd; and that it was a question for the jury whether the making of the speech was the proximate or remote cause of the injury.

The First Division of the Court of Session decided in accordance with this view in *Scott's Trustees v. Moss*,² where the facts were very like those in *Guille v. Swan*, with, however, an important difference. The proprietor of certain gardens advertised that a balloon would ascend from his grounds, and that a descent from the balloon by parachute would also take place in the grounds at a certain time. A crowd collected outside the gardens to see the descent, which, instead of being made in the gardens, took place in a field of turnips on a farm adjoining the gardens. The crowd broke down the fences, rushed upon the field and did damage. The Lord Ordinary held that the facts raised no case of liability against the proprietor of the gardens. The Court of Session reversed his decision and laid down the principle, that "if the collection of the crowd and the actings of the crowd are the natural and probable consequences of the action of the defender—a consequence which the defender ought to have foreseen—then the case is relevant." This seems correct. The distinction between *Guille v. Swan* and the present case appears to be that in the former there was no attempt to collect a body of people; and the place of the balloon's descent was a matter of entire uncertainty depending upon the shifting of air currents and other matters as uncertain; in the latter people were collected by advertisement and the place of descent was precisely indicated—the collection of people in the neighbourhood was premeditated, and for the purpose of being present at a show. The facts therefore raised a case for the jury whether the damage that resulted was the natural and probable consequence of the train of events prepared by the defendant.

¹ 70 Pa. St. 86, 10 Am. R. 664.

² 17 Rettie 32.

Intervening
cause.

"Much consideration," it is said in a Canadian Case,¹ "has been given in the Courts of the United States to the subject of intervening cause, and it has been held there that the intervening cause must be culpable, and if the intervening person's act is innocent, the intervention is no defence (*Emporia v. Schmidling*, 33 Kans. 485; *Pastene v. Adams*, 49 Cal. 87); nor is it if the intervener is a child of tender years and immature intellect, or a person of weak mind (*Binford v. Johnston*, 82 Ind. 426); or not a free agent—going back to the old case (*Scott v. Shepherd*, 2 W. Bl. 893)."

We are thus brought round to the rule, that the question of whether the intervention of a conscious or responsible agency may be inferred, is a question for the judge; whether it ought to be, is for the jury in each case as it arises.²

Victorian
Railway Com-
missioners v.
Coulton.

(4) The decision of the Privy Council in *Victorian Railway Commissioners v. Coulton*³ has been commonly looked on as asserting a new principle of limitation. It must therefore be considered with some care. The gate-keeper of a crossing over a railway had negligently opened a gate over the line so that the plaintiff and his wife, who were driving in a buggy, might cross; and they were already on the farther line when a train was seen approaching. The gate-keeper directed Coulton to go back, but he shouted to the gate-keeper to open the opposite gate and went on. He got the buggy across the line so that the train passed close to the back of it and did not touch it.⁴ The wife fainted, and the medical evidence shewed that she "received a severe nervous shock" which produced a miscarriage,⁵ and "that the illness from which she afterwards suffered was the consequence of the fright." The judgment of the Privy Council⁶ continues, "one of the plaintiff's witnesses said she was suffering from profound impression on the nervous system, nervous shock, and the shock from which she suffered would be a natural consequence of the fright. Another said he was unable to detect any physical damage; he put down her symptoms to nervous shock."

Judgment of
the Privy
Council.

The Supreme Court of Victoria held that an action was maintainable by plaintiff and his wife for the injuries caused. The Privy Council⁷ reversed this decision on the ground that "Damages

¹ *McKelvin v. The City of London*, 22 Ont. R. 70, per Falconbridge, J., at 77.

² Per Lord Cairns, C., *Metropolitan Railway Company v. Jackson*, 3 App. Cas. 193, at 197.

³ 13 App. Cas. 222.

⁴ In the report of the case before the Supreme Court of Victoria, it is said the evidence "showed that a train came past and just scraped the wheels of the vehicle in which the plaintiffs were": 12 Vict. L. R. 895.

⁵ See the Victorian Law Report as above.

⁶ Delivered by Sir Richard Couch.

⁷ Lord Fitzgerald, Lord Hobhouse, Sir Barnes Peacock, and Sir Richard Couch.

arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident, caused by negligence, had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which often exists, in case of alleged physical injuries, of determining whether they were caused by the negligent act would be greatly increased, and a wide field open for imaginary claims."¹ Their decision is expressed to be "that the first question,² whether the damages are too remote, should have been answered in the affirmative, and on that ground, without saying that 'impact' is necessary, that the judgment should have been for the defendants."

The starting-point of this reasoning is, that nervous shock and mental shock are identical,³ and that they are opposed to actual physical injury. Now, it is undoubted law that mental pain or anxiety alone, unattended by any injury to the person, cannot sustain an action.⁴ What the law understands by mental suffering

Reasoning
examined.

¹ In the judgment in *The Corsair*, 145 U.S. (38 Davis) 335, 348, it is incidentally remarked: "Fright for a few minutes is too unsubstantial a basis for a separate estimation of damages." A statement that looks as if in the opinion of the Supreme Court of the United States fright might be an element of legal damage.

² The points reserved were: 1. Whether the damages awarded by the jury to the plaintiffs or either of them are too remote to be recovered. 2. Whether proof of "impact" is necessary in order to entitle plaintiff to maintain the action. 3. Whether the female plaintiff can recover damages for physical or mental injuries, or both, occasioned by fright caused by the negligent acts of the defendant.

³ As to this as a scientific position, see Sir William Hamilton, *Lectures on Metaphysics*, vol. i. lect. xv. n. a, and App. II.; as a legal position, per Palles, C.B., *Bell v. Great Northern Railway Company*, 26 L. R. Ir. 428, at 441.

⁴ *Lynch v. Knight* 9, H. L. C. 577, 598. See a very full examination of the cases, in the judgment reported in *Johnson v. Wells*, 3 Am. R. 245, great part of which is a *verbatim* transfer of the judgment in *Pennsylvania Railroad Company v. Allen*, 53 Pa. St. 276. It has sometimes been assumed that a person injured cannot recover for mental suffering. This is not correct. The ordinary direction to a jury in a personal injury case is, that they must allow something for pain and suffering. And the distinction between the damages allowed under Lord Campbell's Act and those recoverable in a common law action for personal injury is, that in the former case the jury "cannot take into consideration the mental suffering of the survivors or loss of society which they have sustained": Roscoe, *Nisi Prius* (16th ed.), 767; in the latter the wrongdoer is responsible "for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct"; *Rigby v. Hewitt*, 5 Ex. 240, 243. The expression is perhaps not minutely accurate, although for present purposes it is sufficient. In *Blake v. Midland Railway Company*, 18 Q. B. 93, at 111, Coleridge, J., delivering the judgment of the Court, said: "When an action is brought by an individual for a personal wrong, the jury, in assessing the damages, can with little difficulty award him a solatium for his mental sufferings alone, with an indemnity for his pecuniary loss." He then goes on to contrast with this the difficulty "to estimate the respective degrees of mental anguish of a widow and twelve children" for the loss of husband and father. In *Kennon v. Gilmer*, 131 U.S. (24 Davis) 22, 26, Gray, J., said: "The action is for an injury

may be gathered from what was said in *Blake v. The Midland Railway Company*, by Coleridge, J.: "If the jury were to proceed to estimate the relative degree of mental anguish of a widow and twelve children from the death of the father of a family, a serious danger might arise of damages being given to the ruin of the defendants."¹ The notion at the bottom of this has evidently relation to the moral or intellectual sense.² The law will not compensate, cannot compensate, for mental suffering in this sense; because it is not a consequence that in the long run has any objective symptoms, or can be submitted to any reasonable tests. If "mental suffering" is not limited to suffering caused to the intellectual or moral sense, and is used, interchangeably with nervous shock, to signify the same class of effect, than "nervous shock" in animals, apart from physical contact, like "nervous or mental shock" in human beings (for the Privy Council treats the two states as co-extensive), will not give ground for action. Now a negligent act, apart from "impact" or actual physical contact, which frightens a horse and causes him to bolt so that he is injured, is a ground of action.³ "Mental

to the person of an intelligent being; and when the injury, whether caused by wilfulness or by negligence, produces mental as well as bodily anguish and suffering, independently of any extraneous consideration or cause, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is awarded." This was said in affirmance of an instruction to a jury which had been questioned—that they were to take into consideration the plaintiff's "bodily and mental pain and suffering both taken together" ("but not his mental pain alone"), and such as "inevitably and necessarily resulted from the original injury." There seems to be an analogy to the cases under the Lands Clauses Act, 1845, which distinguish between compensation for lands taken, when compensation is also given for consequential damage to other lands of the same owner injured but not taken, and damage done to the property of an owner, none of whose land is taken, and who therefore cannot recover for injuries merely consequential on the improvement; and this (as is said by Lord Bramwell in *Cowper-Essex v. Local Board for Acton*, 14 App. Cas. 153 at 171) is so as not to "give opportunity for vague and unfounded claims." There is a power to order a personal examination of the injured person in railway cases under 31 & 32 Vict. c. 119, s. 26. No such power, however, exists apart from the Act. The codes of some of the States of the American Union confer wider powers. See *Richmond and Danville Railroad Company v. Childress*, 14 Am. St. R. 189, and note. In the *Gardner Peerage Case*, *Marchant's Gardner Peerage Claim*, 78, 172, 175, it is taken for granted that the statements of a patient to a physician of symptoms and complaints are competent and admissible. In *Aveson v. Kinnaird*, 6 East, 188, at 195, Lord Ellenborough says: "What were the complaints, what the symptoms, what the conduct of the parties themselves at the time are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing." See the full discussion in *Barber v. Merriam*, 95 Mass. 322, also the note to *West v. Western Union Telegraph Company*, 7 Am. St. R. 530, "Mental anguish as an element of damages."

¹ 21 L. J. Q. B. 233, 238. As to what the law regards as "mental suffering," see *Wyman v. Leavitt*, 71 Me. 227, where the question whether a fright of sufficient severity to cause a physical disease would support an action, was proposed but not answered; also *Gulf Coast and Santa Fé Railway Company v. Levy*, 46 Am. R. 278; *Kennon v. Gilmer*, 131 U.S. (24 Davis) 22, at 26; *District of Columbia v. Woodbury*, 136 U.S. (29 Davis) 450, at 459.

² Sir William Hamilton, Lectures, as above.

³ *Blower v. Adam*, 2 Taunt. 314; *Manchester South Junction, &c., Railway v. Fullarton*, 14 C. B. N. S. 54; *Harris v. Mobbs*, 3 Ex. D. 268; *Wilkins v. Day*, 12 Q. B. D. 110; *Brown v. Eastern and Midlands Railway Company*, 22 Q. B. D. 391; *Davis v. Charlton*, 140 Mass. 422; *Conklin v. Thompson*, 29 Barb. (N.Y.) 218—a case where

shock," then, and "nervous shock" do not cover precisely the same ground; else we should be driven to the conclusion that the law laid down that nervous shock, which would found an action when communicated to a horse, would not found one when it affected a human being, though the cause was in both cases the same. There is, so far, no evidence of a distinction so arbitrary.

Perchance it may be urged that the possession and non-user or mis-user of intellectual or moral faculties may differentiate the cases, and take away the right of action where a human being is concerned, and leave it where a horse is concerned. This, however, is well-established not to be so.¹

In explanation of the two classes of cases, it must be borne in mind that the loss of friends or fortune, or those things which are most ordinarily associated with the notion of mental shock, do not, on a comparison of the long run of cases, produce appreciable injury to the physical health; and, where they do, would not, on the ground that this result is not the ordinary and reasonably to be looked-for result, be the subject of damages. This consideration is independent of the other ground, of the impossibility of fixing a standard for their estimation. On the other hand, the effect of terror is almost invariably to produce nervous disorder; as the judgment of the Privy Council says: "The shock from which she suffered would be a natural consequence of the fright;" not through the action of intelligent or moral feelings, but directly and in regular sequence. Nervous disorder, when manifesting itself by a miscarriage and a long illness, is somewhat ludicrously described as "mental shock." A main distinction between mental shock and nervous shock may be indicated as being that where "mental shock" is produced, the operation on the nervous system is through a distinct set of causes. The mind, the intellectual principle, is affected, and may press on the health. Where nervous shock is produced, the terror is merely another expression for a direct effect on the nervous system—a portion of the physical organisation. Yet injury which a man inflicts on himself, through fright, may import an actionable wrong for which damages are recoverable. Then, whether the subject of terror be man or beast, where the terror is followed by physical consequences, an action would seem to lie. If, then, in the case

Distinction
between "men-
tal shock" and
"nervous
shock."

a horse died from sudden fright, caused by the explosion of a cracker between its legs. In *Simkin v. London and North-Western Railway Company*, 21 Q. B. D. 453, there was no action, not because the horse was *only* frightened, but because there was no negligence on the defendant's part in frightening him. *Galer v. Rawson*, 6 Times L. R. 17.

¹ *Jones v. Boyce*, 1 Stark, N. P. 493; *Buel v. N. Y. Central Railroad Company*, 31 N. Y. 314; *Coulter v. The American Union Express Company*, 5 Lans. 67, 56 N. Y. 585.

under discussion, the wrongful and negligent act of the defendant had caused the plaintiff's wife to fling herself from the buggy, and a miscarriage had been produced, and a long illness attendant thereon, the plaintiff could have recovered.¹ While, because the terror was so great that she fainted, instead of springing out of the buggy, though identical consequences may have been produced by the defendants' act, the learned judges in the Privy Council are of opinion that she cannot recover. The damages, say they, are occasioned "by a nervous or mental shock." We have, however, seen that the mere fact of injury arising from a "nervous shock" does not disentitle, even when the subject, besides having nerves, has intelligence and moral sense. Terror occasioning a nervous shock, when the consequences flowing therefrom are objectively manifested, we have seen, in the case of *Jones v. Boyce*,² where a human being is concerned, and in the case of *Wilkins v. Day*,³ where a horse is concerned, may alike give a ground of action. The defect in the chain of consequences is not, in its first link, terror, but in some subsequent one.

Actual physical incommo-
dity following
nervous shock.

In the case under discussion, the negligent act of the defendant produced a miscarriage and a long illness, involving actual physical incommo-
dity following nervous shock. If then, in natural and ordinary sequence, physical illness is produced through the action of the nervous system disorganising the condition of the physical frame, it is a strange conclusion to be compelled to arrive at, that what, when done in relation to a horse or an ox, is actionable, may be done with impunity in relation to a human being.⁴ On principle, accordingly, a cause of action seems to exist.⁵

¹ *Jones v. Boyce*, 1 Stark. (N.P.) 493. See, per Martin, B., *Wilson v. Newport Dock Company*, L. R. 1 Ex. 177, at 187.

² 1 Stark. (N.P.) 493.

³ 12 Q. B. D. 110. In *New York Railroad Company v. Estill*, 147 U.S. (40 Davis) 591, it was held that the owner of pregnant cattle could recover for damages caused by abortion, resulting from the negligence of a railway company. The onus was on the plaintiff to show that the abortions were the direct result of the accident. That being done, "it was not necessary for the plaintiff to show that the defendants had notice at the time of shipment that the heifers were in calf, in order to render it liable for the depreciation of their market value in consequence of the abortions. It was not claimed by the plaintiffs that on account of the heifers being with calf any special care was necessary in transporting them, and the suits were not brought on account of the absence of any such special care."

⁴ *Conklin v. Thompson*, 29 Barb. (N.Y.) 218.

⁵ In *Fitzpatrick and Wife v. The Great Western Railway Company*, 12 U. C. Q. B. 645, the declaration stated that plaintiff, being pregnant, at the request of defendants became a passenger in one of their carriages to be safely conveyed by them for reward; that the defendants received her as such passenger, and it was their duty to use due care in conveying her, yet the defendants not regarding, &c., so negligently conducted themselves that a collision took place with another train, by means whereof the carriage in which the plaintiff was, was broken, &c., and thereby the plaintiff was much affrighted and alarmed, whereby she became sick, sore, and disordered, and so

To approach the subject from another point of view;—in the judgment of the Supreme Court of Victoria the following case is put: “If a person were wantonly and mischievously to come close behind another person, who was suffering from heart or nervous disease, and discharge a gun, causing a severe shock to such person’s nervous system, could it be said that an action would not lie for damages in respect of the physical and mental injuries arising from that wanton and mischievous act?”¹

The same line of illustration is adopted in Sir James Stephen’s “History of the Criminal Law.”² “A very slight nervous shock might in many cases kill a person suffering under disease of the heart as effectually as a shot or a stab. I suppose there are cases in which acts, which in health would pass unnoticed, such as the disarrangement of a pillow, sudden waking from deep sleep, or the sudden communication of bad news, might cause the death of a sick person, just as a man hanging over a precipice might be killed by loosening a stone or a root. In all such cases the connection between cause and effect is not only definite, but, when the facts are known, it is obvious; but they are all cases in which death is caused without the infliction of any such obvious definite bodily injury as seems to have been required by the old law in order to make an act of homicide. To shout in the ear of a sleeping man who has certain diseases of the heart may be as effectual a way of killing him as a stab with a knife, but, at first sight, such a death would not be described as being caused by any definite bodily injury. Should such a case occur in the present day, I think it would be regarded as killing.”³

Stephen’s
“History of
the Criminal
Law.”

A passage from Hale’s “Pleas of the Crown”⁴ is then cited for the opposite view, and argues that “because no external act of violence was offered, and secret things belong to God,” therefore “by working on the fancy of another, or possibly by harsh or unkind usage,” no felony is committed. However, Sir James Stephen continues: “The great improvements which have taken place in medical knowledge since Hale’s time, of course, make it possible in the present day to speak much more decisively on the question whether death has been caused by a given act, or set of acts, than was formerly possible. It might be impossible to say precisely whether a woman’s death was caused by the unkindness of her husband,

Hale’s “Pleas
of the Crown.”

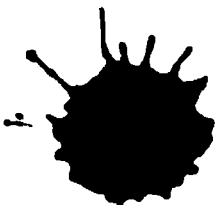
continued from thence, hitherto and thereby also by reason of the terror and alarm occasioned to her by the said collision and of such sickness caused thereby, she had a premature labour and bore a still-born child. This was held on general demurrer to disclose a cause of action.

¹ 12 Vict. L. R. 895.

² Vol. iii. 5.

³ Cp. Digest of Criminal Law, 145, Illustrations (1), (2).

⁴ Vol. i. 429.



but where death was caused by a definite nervous shock, or the like, I suppose there would be no difficulty in ascertaining the fact."

We have here, then, an opinion that to constitute a criminal act in the nature of homicide actual impact is not necessary. And secondly, that where the consequences of a definite nervous shock may be traced, a criminal liability attaches to the person who caused the shock.

Rex v. Evans.

Further, so far as criminal responsibility goes, there are decided cases for the proposition that, to raise criminal responsibility, mere physical force is not necessary, and that the consequent nervous shock may be traced back to the originator.¹ Thus, the defendant, a husband, beat his wife and threatened to throw her out of the window and to murder her; by such threats she was so terrified that through fear of his putting his threats into execution, she threw herself out of the window, and of the beating, and the bruises received by the fall, died. Heath, Gibbs, and Bayley, JJ., were of opinion that "if she were constrained by her husband's threats of further violence and from a well-grounded apprehension of his doing such further violence as would endanger her life, he was answerable for the consequences of the fall as much as if he had thrown her out of the window himself."² And

Rex v. Hickman.

this was cited and followed by Park, J., in Rex v. Hickman.³ In both these cases there was antecedent physical violence. Not

Regina v. Pitts.

so, however, in Regina v. Pitts,⁴ where Erskine, J., summed up: "A man may throw himself into a river under such circumstances as render it not a voluntary act, by reason of force applied either to the body or the mind. It becomes, then, the guilty act of him who compelled the deceased to take the step." Bishop, too, in his "Criminal Law"⁵ points out that the old criminal law held it to be murder intentionally to cause the death of a human being on trial for his life by appearing as a witness against him and committing perjury; and he also says, "nothing can be clearer in legal principle than that in the proper circumstances mental force employed to create a physical injury to an individual may be punishable;" and *à fortiori* may create liability to a civil action.⁶

Bishop's "Criminal Law."

Illustrated from the law of trespass.

Again, as far as intentional wrongs go, the law is plain, that actual contact ("impact") is not necessary in order to give a right

¹ See the decision of the Court of Crown Cases Reserved in *The Queen v. Halliday*, 61 L. T. 701.

² *Rex v. Evans*, O. B. Sept. 1812, MS. Bayley J., cited 1 Russ. Crimes, 5th edit. 651.

³ 5 C. & P. 151.

⁴ C. & M. 284.

⁵ Vol. i. (6th ed.) § 564. And see Hawk. P. C. bk. 1, ch. 13, § 7.

⁶ *Mogul Steamship Company v. McGregor*, 23 Q. B. Div. 598; (1892) A. C. 25.

of action for trespass; and, since in trespass the intent is immaterial,¹ it follows that "impact" is not necessary to enable a person injured by negligence to recover. That being so, in the case under discussion, the defendants were admittedly guilty of negligence, which produced fright or nervous shock, which manifested itself as "a natural consequence" in miscarriage and illness. It is thus exceedingly difficult to maintain *Victorian Railway Commissioners v. Coultas* by reference to principles of law extraneous to the case and apart from the authority of the Court as constituted when it was decided.²

In Ireland the Exchequer Division, after having the question very fully argued in *Bell v. Great Northern Railway Company*,³ refused to follow *Victorian Railway Commissioners v. Coultas*; and Pilles, C.B., pointed out that the same question raised before the Privy Council had been considered four years previously in Ireland and decided in a sense adverse to the Privy Council's decision, "first in the Common Pleas Division, then presided over by the present Lord Morris, and afterwards in the Court of Appeal, in a judgment delivered by the late Sir Edward Sullivan" in an unreported case of *Byrne v. Great Southern and Western Railway Company*. In that case, adds the chief Baron, "there was nothing in the nature of impact." This decision of *Byrne v. Great Southern and Western Railway Company*, the Irish Exchequer Division preferred to *Victorian Railway Commissioners v. Coultas*. Pilles, C.B., thus sums up his opinion: "As the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any Court to lay down as matter of law, that if negligence cause fright, and such fright in its turn so affects such structures as to cause injury to health; such injury cannot be a consequence which in the ordinary course of things would flow from the negligence, unless such injury 'accompany such negligence in point of time.'"

Irish decisions conflicting with *Victorian Railway Commissioners v. Coultas*.

Pilles, C.B.'s view.

The chief objection in principle to a recovery for injuries occasioned, without physical impact, seems to be the difficulty

Principle of the objection to allowing recovery in cases like *Victorian Railway Commissioners v. Coultas* considered.

¹ *Stephens v. Myers*, 4 C. & P. 349; per Tindal, C.J.; Addison, *Torts* (4th ed.), 569; *Read v. Coker*, 13 C. B. 860; Y. B. 21 Hen. VII. 27, pl. 5, A.D. 1506, cited by Holmes, *The Common Law*, 87; *Covell v. Laming*, 1 Camp. 497.

² Cp. per Channell, B., *Smith v. London and South-Western Railway Company*, L. R. 6 C. P. 14, adopting what was said by Bramwell, B., in *Blyth v. Birmingham Waterworks Company*, 11 Ex. 781-785, *post*, 100. *Seger v. Town of Barkhamsted*, 22 Conn. 289. In *Huxley v. Berg*, 1 Stark. (N.P.) 98, the action was by the husband for trespass and battery. The wife was dead, and therefore any possible right of action died with her; and if it did not, damage for personal injury to her was not claimed. In *Shearman v. Redfield*, *Negligence*, 4th ed. § 742, note 2, is a collection of American cases that may be referred to in this connection.

³ L. R. Ir. 26 C. L. 428.

of testing the statements of the sufferers alleging them. An allowance of recovery of damages in respect of such nervous injuries affords opportunities for simulation very difficult to be dealt with, and considerations of policy may well disallow any claim in respect of injury purely subjective. When the physical frame is visibly affected considerations of this kind are no longer paramount. The objection goes rather to the proof of the injuries than to the legal appraisal of damages in respect of them when proved. A sufficient safeguard in this case against imposition seems to be the bearing steadily in view the elementary rule that before a plaintiff can recover he must show a damage naturally and reasonably arising from the negligent act.¹

Walker v.
Great Northern
Railway Com-
pany of Ire-
land.

In this place an extraordinary Irish case may be noted. Walker v. Great Northern Railway Company of Ireland² is an action for damages against a railway company. The statement of claim alleged that at the date of the injuries complained of the plaintiff's mother was quick with child, namely, with the plaintiff, to whom she afterwards gave birth, that being so quick with child the plaintiff's mother was received by defendants as a passenger, &c. Then followed an averment that the defendants so negligently and unskilfully conducted themselves in carrying the mother and the plaintiff, being then *in ventre sa mère*, that the plaintiff was thereby wounded, permanently injured and crippled. To this there was a demurrer, and the Irish Queen's Bench, after hearing the matter elaborately argued, held that the statement of claim disclosed no cause of action. For the demurrer it was contended that the infant was not at the time of the accident a person in *rerum natura* and therefore could not sustain the action; that the liability of the railway company depended on contract express or implied, and there was neither with the plaintiff; and that the case of *The George and Richard*³ under Lord Campbell's

¹ Sedgwick (Damages, 8th ed. § 861) regards *Victorian Commissioners v. Coultas* as a wrong decision. In *North British Railway Company v. Wood*, 18 Rottie (House of Lords) 27, the question was raised but not decided. *Ewing v. Pittsburg, &c., Railroad Company*, 147 Pa. St. 40, 30 Am. St. R. 709, is an unflinching upholding of the view, that mere fright or mental agony caused by a railway accident, unaccompanied by some physical injury to the person, is too remote to sustain an action for negligence, *although it produces permanent injury to the nervous system*. The wrongful acts alleged were a collision of cars upon the railway of the defendants, by which the cars "were broken overturned and thrown upon the track and fell upon the lot of ground and premises of the plaintiffs and against and upon the dwelling-house of the plaintiffs, and thereby and by reason thereof greatly endangered the life of the said Eva Ewing then being in said dwelling-house and subjected her to great fright, alarm, fear, and nervous excitement, whereby she then and there became sick and disabled and continued to be sick and disabled from attending to her usual work and duties and suffered and continued to suffer great mental and physical pain and anguish and is thereby permanently weakened and disabled." The decision was on demurrer to this declaration.

² 28 L. R. Ir. 69.

³ L. R. 3 Ad. & E. 466.

Act was governed by the principles which apply to cases of an infant's property or rights as the child of its parents.

The Chief Justice O'Brien disposed of the case "upon a single ground, namely, that there are no facts set out in the statement of claim which fix the defendants with liability for breach of duty as carriers of passengers. This is not a case of trespass. It is now settled law that railway companies do not warrant the absolute safety of passengers; all they undertake with regard to passengers is a duty to carry with due and reasonable care, and their liability is for negligence arising from a breach of that duty."¹ Harrison, J., while concurring that "no cause of action as against the defendants could . . . then exist on the part of the plaintiff or arise after the plaintiff was born from the mere fact that her mother had been received by the defendants as a passenger, being at the time *enceinte* of the plaintiff, and that while she was a passenger an accident occurred through the defendants' negligence, which after the plaintiff's birth it appeared had injured her," on the assumption that such a cause of action *could* exist, was of opinion that in the case before the Court "the plaintiff is not averred or shown to have been on the defendants' railway" with the defendants' authority "when the accident occurred."² "In the present case it is not even averred that the defendants knew of the pregnancy of the plaintiff's mother when they received her as a passenger." O'Brien, J., decided that two elements necessary to a contract were wanting—"the right and the consideration;"³ and Johnson, J., in a judgment in which a great mass of authorities is reviewed, comes to the conclusion—"at that time (*i.e.*, of the accident) the plaintiff had no actual existence; was not a human being; and was not a passenger—in fact, as Lord Coke says,⁴ the plaintiff was then *pars viscerum matris*, and we have not been referred to any authority or principle to show that a legal duty has ever been held to arise towards that which is not *in esse* in fact, and has only a fictitious existence in law so as to render a negligent act a breach of that duty."⁵

Judgment of
O'Brien, C.J.

Judgment of
Harrison, J.

Judgment of
O'Brien, J.

Judgment of
Johnson, J.

¹ 28 L. R. Ir. 69, at 78.

² 28 L. R. Ir. 69, at 80.

³ 28 L. R. Ir. 69, at 83. The closing sentence of O'Brien, J.'s judgment merits reproduction: "In law, in reason, in the common language of mankind, in the dispensations of nature, in the bond of physical union, and the instinct of duty and solicitude, on which the continuance of the world depends, a woman is the common carrier of her unborn child, and not a railway company." Assuming the above to be an argument and not a joke, the answer is, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents and though its contents are ever so valuable if he does not make a special acceptance: *Kenrig v. Eggleston*, Ayleyn 93; *Hart v. Pennsylvania Railroad Company*, 112 U.S. (5 Davis) 331, 340. True, the case in point is the case of a passenger, but then the carrier is guilty of negligence. (Cp. *New York, &c., Railroad Company v. Estill*, 147 U.S. (40 Davis) 591, 617.

⁴ Earl of Bedford's case, 7 Rep. 7 b., 9 a.

⁵ 28 L. R. Ir. 69, at 88.

Cases considered.

The point, on which much stress was laid, of the particular form of the pleading in this case need not occupy time to examine. The inquiry is rather, assuming proper pleading, is there any and what liability from a railway company to an infant injured, while *en ventre sa mère* by the railway company, and whose injuries are developed subsequently at birth? One of the judges¹ objected, "the inherent and inevitable difficulty or impossibility of proof." This consideration has already been gone into in the discussion on *Victorian Railway Commissioners v. Coultas*. It is for the plaintiff to prove his case; if he does so there is no difficulty; if he does not there is no liability. The case therefore may be considered unfettered by difficulties of that kind. The civil law is clear. *Qui in utero est, perinde ac si in rebus humanis esset, custoditur, quoties de commodis ipsius partus quæritur; quanquam alii, antequam nascatur, nequaquam prosit;*² and again, *qui in utero sunt in toto pæne jure civili intelliguntur in rerum natura esse. Nam et legitimæ hereditates his restituntur.*³ In the case of *Blasson v. Blasson*,⁴ moreover, Lord Westbury, C., cites the civil law as affording a guide to the English law.

Texts of the Civil Law.

Richards v. Richards distinguished.

Some of the Irish Judges were of opinion that *Richards v. Richards*⁵ is in favour of their view. A study of that case will, however, show that this was a mistake; for the decision was not on the ground that the infant *en ventre sa mère* was "considered not in existence," but on purely feudal reasons; "that as the posthumous heir was not in existence to perform the duties of tenant the person on whom the law threw the burden was in consequence held entitled to that which flowed from the burden, namely, the enjoyment of the rents and profits."⁶

Question of contract.

Again, in answer to the reason given by the Chief Justice for his view, it may be pointed out that the railway company, quite apart from any theory of contracts, are bound to carry on their business without negligence; and in the present case were in default by their negligence. Since, then, the company were in default, they become liable to any one, injured through a natural and necessary consequence of their default, who was not contributory to the injury by being also in default. True, the plaintiff was not carried with "the defendants' authority,"⁷ if by that is signified the direct authorization of the defendants. On the other hand, it is plain that, whatever her

¹ O'Brien, J., at 81.

² D. 1, 5, 7.

³ D. 1, 5, 26.

⁴ 2 De Gex, J. & S. 665, at 670. See *Thellusson v. Woodford*, 4 Ves. 227, 11 Ves. 112; 6 Cruise, Digest, 430, 451, 458; and the authorities cited in a note by Blunt to *Bennett v. Honeywood*, Amb. at 712; 1 Spence Eq. Jur. 617; 2 Spence Eq. Jur. 164; 2 Wms. Saund. 380, note at 387.

⁵ Johns. (Ch.) 754.

⁶ Per Page Wood, V.C., at 762.

⁷ Cp. *Great Northern Railway Company v. Harrison*, 10 Ex. 376. *Skinner v. London and Brighton Railway Company*, 5 Ex. 787.

rights, she was not in default; while the injury was caused by the wrongdoing of the defendants. The point of contract then on which the majority of the Court seems to decide becomes inapplicable. The case may better be put that the child when born is injured without fault by the default of the railway company. As was said in argument in *Darley Main Colliery Company v. Mitchell*,¹ "an injury has not occurred till it is known to be an injury." The wrongful act of the railway company produced its injury on the birth of the child; and even if the right of action was not vested before, it became so then, there being a breach of the duty of the company not to be negligent followed at birth with damage to the plaintiff, who was free from fault. This would seem the sufficient answer to Johnson, J. Further, the want of authority from the defendants for the child to be where it was, if in truth there was any such want of authority, would not in this case disentitle, because the element which alone makes want of authority material is absent—*i.e.*, fault in the person there without authority. If a person were bound and placed by a railway line against his will, and were there injured by the negligence of the railway company's servants, it would be no answer to an action to say "the plaintiff was not there by the defendants' authority." Or if it were, the point would be sufficiently answered by shewing the plaintiff was where he was without his fault.

"Then," says Johnson, J., "it is contended that this action lies in analogy to the criminal law, that if a child born alive afterwards dies of injuries received *in utero*, there is murder in the person who inflicted them;² but I think this is no true analogy between crime and tort in this case;" because, in short, the punishment of crime is for the public benefit, while the remedy in tort is for private redress. So far from there being no analogy, crime and tort are in any individual case merely different aspects of the same set of facts. "In all cases," says Comyns,³ "where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages," and admitting Johnson, J.'s, assumption, that in some cases there is no analogy, in many cases the analogy is so close that something more than the bare assertion is necessary in the case in question to carry conviction of the justice of the assertion.⁴

Johnson, J. s.
judgment criti-
cized.

(5) The case may arise of the co-operation of two or more influ- Co-operating causes.

¹ 11 App. Cas. 127, at 130. See, also, per Lord Blackburn, at 142.

² 1 Russ. Crimes (5th ed.), 645.

³ Action upon the case (A). See *Doe dem. Lancashire v. Lancashire*, 5 T. R. 49, per Grose, J., at 63.

⁴ Cp. *Wells v. Abraham*, L. R. 7 Q. B. 544, and that class of cases.

I. Injury through defect in condition of a way, and negligence.

ences in producing a result injurious to some person to whom a duty is owing. The question then comes, how far is each liable? To quote an instance given by Dr. Wharton: Where an injury to a passenger on a highway is occasioned partly by ice with which the road is covered, and partly by a defect in the structure of the road, the parties responsible for the defectiveness of the road are liable, notwithstanding the fact that the ice contributed to the injury. The ice was a *condition* of the injury; the negligent construction of the road its cause.¹

II. Where one negligent act is prior to the other.

Again, one person may be negligent, and by the negligent or wilful act of another, the negligent act of the first may cause injury to a third; then a distinction is to be taken. If the first negligent act is not in its nature such that the second might be looked for, as a natural and probable cause, then the first negligent person is not responsible.² If the subsequent negligence is likely to follow from the antecedent negligence, then the first negligent person is liable;³ and the question will most usually have to be left to the jury whether the first wrongdoer's act was the proximate cause of the plaintiff's injury. Even though the first wrongdoer may be liable, the second is not therefore discharged,⁴ since each is liable for the total results of the joint wrong—that is, where the consequences are not referable to the separate agency of each in their just proportions.⁵

Burrows v. March Gas Company.

The decision in *Burrows v. March Gas Company*⁶ in the Court of Exchequer was implicitly based on this ground. "The de-

¹ He cites *City of Atchison v. King* (1872), 9 Kan. 550. Plato happily illustrates the distinction between causes and conditions in the *Phædo* (Bek. ed.), § 108 *et seq.* Socrates explains that the cause of his sitting talking to his friends, instead of avoiding death by escaping to Megara, is not his having body and sinews; they are but the conditions. The cause is his obligation to obey the laws of the State. Hume's comment on the duty to obey founded on a promise is: "The only passage I meet with in antiquity, where the obligation of obedience to government is ascribed to a promise, is in Plato's *Crito*, where Socrates refuses to escape from prison because he had tacitly promised to obey the laws. Thus he builds a *Tory* consequence of passive obedience on a *Whig* foundation of the original contract." Hume, *Essays: Of the Original Contract*. "That condition," says Appleton, C.J., *Moulton v. Sanford*, 51 Me. 127, 134, "is usually termed the cause whose share in the matter is the most conspicuous and is the most immediately preceding and proximate to the event." The judgment of Finch, J., *Taylor v. Yonkers*, 105 N. Y. 202, contains a very valuable examination of the principle of law applicable "when two causes combine to produce an injury to a traveller on a highway, both of which are in their nature proximate."

² *Clark v. Chambers*, 3 Q. B. D. 327; *Collins v. Middle Level Commissioners*, L. R. 4 C. P. 279; *Carter v. Towne*, 103 Mass. 507; *Hofnagle v. N. Y. Central Railroad*, 55 N. Y. 608. The Roman law on this point is:—*Si vulneratus fuerit servus non mortifere negligentia autem perierit, de vulnerato actio erit, non de occiso* (D. 9, 2, 30, § 4).

³ *Lane v. Atlantic Works*, 111 Mass. 136, 139.

⁴ *Lake v. Milliken*, 62 Me. 240, 242.

⁵ Co. Litt. 232 a. *Sutton v. Clarke*, 6 Taunt. 29; *The Bernina*, 12 P. Div. 58, at 93, per Lindley, L.J.; *The Avon and Thomas Joliffe*, per Butt, J., (1891) P. 7, at 8.

⁶ L. R. 5 Ex. 67, L. R. 7 Ex. 96. *Oil City Gas Company v. Robinson*, 99 Pa. St. 1; *Gulf, &c., Railroad Company v. McWhirter*, 19 Am. St. R. 755.

endants," said Kelly, C.B., "having been guilty of negligence *by which the accident was caused*, the plaintiff is entitled to maintain his action to recover compensation." Yet, as is pointed out in a treatise of authority,¹ the true ground for the decision is that which is taken by Cockburn, C.J., in the Exchequer Chamber. "The action is not for negligence in its ordinary sense, but for the breach of a contract whereby the defendants promised to supply the plaintiff with a proper and sufficient service pipe from their mains to a gas meter within his premises, and the question is whether there has been a breach of this contract." The accident arose from a defect in the pipe allowing the gas to escape, which exploded when the servant of a third person negligently took a lighted candle into the room where the escape was. Dr. Bigelow, after pointing out that the negligence in the case was not joint but successive, states the true principle, on which to determine the existence or not of liability, is "not whether the defendants' conduct afforded the means for the intervening party to do the act which resulted in the injury, but whether the plaintiff can prove that the defendants' conduct caused the damage." As Cresswell, J., puts the point in *Thorogood v. Bryan*:² "It seems strange to say that A shall not be responsible for his negligence because B. has been negligent likewise, C being the party injured;" or as Maule, J.,³ in summing up in a case of manslaughter says: "It is no defence for one who was negligent to say that another was negligent also, and thus, as it were, to try to divide the negligence among them."

Cresswell, J.'s,
statement of
the ground of
liability.

Maule, J.'s.

The decision in *Paterson v. The Mayor, &c., of Blackburn*,⁴ is important in this connection. In disconnecting the supply of gas from a meter, the gas authorities' workmen merely plugged their own pipe; though it was held they had knowledge that the owner of the meter was going to have it removed, so that there would be no necessity for the continued existence of their pipe. In the course of the work of removing the meter, the pipe got broken, gas escaped in large quantities, and a terrible explosion ensued; for the consequences of which the gas authorities were held liable. Assuming there was no negligence in those removing the meter this decision is obviously right; as, by assuming neglect of ordinary precautions on their part, it seems very dubious. There is, however, an intermediate state in which the consequences may be

Paterson v. the
Mayor, &c., of
Blackburn.

¹ Bigelow, L.C., on Torts, 611.

² 8 C. B. 115, at 121. Cp. *Hill v. New River Company*, 9 B. & S. 303; *Collins v. Middle Level Commissioners*, L. R. 4 C. P. 279; *Nield v. London and North-Western Railway Company*, L. R. 10 Ex. 4; *Whalley v. Lancashire and Yorkshire Railway Company*, 13 Q. B. D. 131.

³ *Reg. v. Haynes*, 2 C. & K. 368; *Reg. v. Swindall*, 2 C. & K. 230.

⁴ 9 Times L. R. 55. See *post*, Gas and Water Companies.

regarded as naturally and probably arising from the want of care in the company without scrutinising minutely the conduct of those removing the meter to see whether they did all that could be required of them. As in Burrows's case, the thoughtlessly taking a candle into a room, even though there is a gas escape there, is a consequence a prudent person might reasonably anticipate; so in the present case the blundering of common workmen, oblivious to a danger not actually manifest, is a consequence against which a diligent gas authority ought to guard. The distinction is that in Burrows's case there was a wrongful agency, attributable to the gas company, actually in operation and progressively increasing its influence;¹ while, in the other case, there was no active cause of harm till one was set in motion by a person over whom the gas authority had no control; though at first suggestive of a distinction in principle, is thus really non-essential.

III. Where the negligent acts are concurrent.

Once more, the negligence may consist in concurrent acts or omissions; then, unless the injuries caused by the concurrent acts can be plainly separated, when the author of each will be liable only for what he has himself caused,² each wrongdoer is liable jointly or severally for the whole damage.³ The case just cited⁴ also lays down that "it is no defence for a person against whom negligence, which caused damage, is proved to prove that without fault on his part the same damage would have resulted from the act of another." And this is certainly good sense. If I had not injured you some one else would, is scarcely an available defence either in criminal or civil law.

The rule.

To revert to the first instance given on this point—the illustration from Dr. Wharton's book.⁵ If both the defect of the road and the existence of the ice were due to responsible agents, then an action is maintainable against either. The fact of only one of the two being due to a responsible agent does not lessen his liability; though the difference between responsible and irresponsible agency may make all the difference, in those who can be proceeded against; so that it may be taken as a rule that when the act of a responsible agent, in ordinary circumstances and

¹ In the first place, the negligence of the gas company must, unless checked, ultimately cause an explosion—*e.g.*, come in contact with fire. In the second place, no explosion can occur without the intervention of another agency.

² Nitro-phosphate Company *v.* London and St. Katharine Docks, 9 Ch. Div. 503. As to the damages recoverable where owing to the negligence of defendants, plaintiff's estate is injured by a flood, see Rust *v.* Victoria Graving Dock Company and London and St. Katharine Dock Company, 36 Ch. Div. 113.

³ Slater *v.* Mersereau, 64 N. Y. 138; Byrne *v.* Wilson, 15 Ir. C. L. R. 332.

⁴ Slater *v.* Mersereau, 64 N. Y. at 147. On the authority of Webster *v.* Hudson River Railroad Company, 38 N. Y. 260; which, however, does not touch the proposition; since there is no attempt to allege even that the same injury would have resulted apart from the negligence of the defendant.

⁵ Negligence, § 86, and *ante*, 88.

not interrupted by causes independent of the actor's will, directly tends to produce the event in question in the natural sequence of events, the agent who sets the force in motion is liable for such of its consequences as may be reasonably anticipated to arise in ordinary course. Or, to vary the expression: if a responsible agency, in conjunction with irresponsible agencies, produces an effect not in ordinary course produced without the operation of the responsible agency, then the responsible agent is liable for the effect produced; and the responsible agent continues liable for the natural consequences of his act, though not for more than such consequences, until the occasion for the intervention of some other responsible agency arises. When a new responsible agent is introduced with a capacity to will, the liability of the antecedent responsible agent ceases.¹

For the operations of Nature, purely as such, undirected by human power, it is manifest no one can be legally accountable. The tendency of heavy bodies to fall, of liquids to flow, of fire to burn, and, generally, of the forces of Nature to follow out the laws of Nature, imposes liability on no one; unless so far as these tendencies are interfered with and their natural course accelerated or diverted by responsible agency.² All human action, again, must be taken with reference to the operations of Nature; the ordinary and accustomed workings of Nature form the *conditions* under which alone human action is possible; and, while they impute liability to no one, form the basis from which all imputability must arise. Yet a further distinction must be taken, between those operations of Nature which are occasioned by the elementary forces of Nature wholly unconnected with the agency of man, and those which owe their injurious influence on man, either in whole or in part, to the agency of man, whether through his commissions or omissions, nonfeasances or misfeasances, or in any way that imposes on them a new motion or course.³

"The rain which fertilises the earth, and the wind which enables the ship to navigate the ocean," says Cockburn, C.J.,⁴

Operations of Nature.
Remarks of Cockburn, C.J., in *Nugent v. Smith*.

¹ See *Marble v. City of Worcester*, 70 Mass. 395. As to "concurring negligence," see *Wormsloe v. Detroit City Railway Company*, 13 Am. St. R. 453.

² *May v. Burdett*, 9 Q. B. 101; *Card v. Case*, 5 C. B. 622; *Smith v. Kendrick*, 7 C. B. 515; *Baird v. Williamson*, 15 C. B. N. S. 376; *Rylands v. Fletcher*, L. R. 3 H. L. 330; *Carstairs v. Taylor*, L. R. 6 Ex. 217; *Smith v. Fletcher*, L. R. 7 Ex. 305; *Ex. Ch. L. R. 9 Ex. 64*; *Ross v. Fedden*, L. R. 7 Q. B. 661; *Hardman v. North Eastern Railroad Company*, 3 C. P. Div. 168.

³ "Inanimate objects may bear to one another all the same relations which we observe in moral agents; though the former can never be the object of love or hatred, nor are consequently susceptible of merit or iniquity. A young tree which overtops and destroys its parent stands in all the same relations with Nero when he murdered Agrippina; and if morality consisted merely in relations, would no doubt be equally criminal."—Hume, *Essays: An Inquiry concerning the Principles of Morals*, Appendix I.; *Concerning Moral Sentiment*, IV.

⁴ *Nugent v. Smith*, 1 C. P. Div. 423, 435.

"are as much within the term act of God, as the rainfall which causes a river to burst its banks, and carry destruction over a whole district, or the cyclone that drives a ship against a rock or sends it to the bottom. Yet the carrier, who by the rule is entitled to protection in the latter case, would clearly not be able to claim it in case of damage occurring in the former. For here another principle comes into play. The carrier is bound to protect goods committed to his charge from loss or damage, and if he fails herein he becomes liable, from the nature of his contract. In the one case he can protect the goods by proper care, in the other it is beyond his power to do so." The liability that arises in the case of the rain or the wind is, however, not a liability arising from the operations of Nature. In themselves, the fall of rain and the blast of wind bring liability to no one; liability arises where duties have been undertaken that involve guardianship against these elements, and it is from the failure to discharge these duties that negligence is imputed.

James, L.J.'s,
definition of
"act of God."

As to the other class of natural agencies, James, L.J.,¹ thus expresses himself: "The 'act of God' is a mere short way of expressing this proposition: A common carrier is not liable for any accident as to which he can shew that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight, and pains, and care, reasonably to have been expected from him." Since the liability of common carriers for negligence is greater than that of any other class, what applies to them *a fortiori* holds good in all other cases of negligence.²

What
constitutes
responsible
agency.

All purely natural forces being thus excluded, a responsible agency for the purpose of inferring liability, comprehends all those with capacity to exercise moral choice, that is—with certain exclusions, which have been already noticed³—all human beings, and none but them. Yet one more distinction must be noted before we part from this aspect of our subject. Where the negligence of a person concurs with some ordinary cause, and the conjunction produces an effect injurious to some other person, it is manifest from

¹ *Nugent v. Smith*, 1 C. P. Div. 423, at 444. In *Nitro-phosphate Company v. St. Katharine Docks Company*, 9 Ch. D. 503, at 515, Fry, J., says: "I do not think that the mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of a recurrence—when, in other words, it does not imply any law from which its recurrence can be inferred—places that phenomenon out of the operation of the rule of law with regard to the act of God. In order that the phenomenon should fall within that rule, it is not in my opinion necessary that it should be unique, that it should happen for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated. That appears to me the view which has been taken in all the cases, and notably by Lord Justice Mellish in the recent case of *Nichols v. Marsland*," 2 Ex. Div. 5.

² *Coggs v. Bernard*, 2 Ld. Raymond, 909, 918; 1 Sm. L. C. (9th ed.) 201.

³ *Ante*, 52.

what has been said, that the operation of such an ordinary cause extraneous to the negligent person will not excuse his liability for the whole of the joint effect. The law is otherwise, where an extraordinary cause is the primary cause of setting in motion an injurious agency and by co-operating with the negligence of a person produces injury to some other person. In this case the negligent person is not liable; for not only would his negligence alone fail to produce the injurious effect (this circumstance, however, is common to the two cases put, and, notwithstanding this, in the former there is no immunity from liability), but the exciting cause being an "extraordinary occurrence" or an "act of God" was not reasonably to be anticipated, and therefore guarded against.¹ The negligent act is not followed by injurious results in natural and probable sequence, but only by the occurrence of something abnormal and not to be anticipated.

II. CASUAL CONNECTION.

We are next to inquire for how long, and in what circumstances, the law imputes responsibility for the consequences of a wrongful act or negligence. Proximate and remote cause.

The starting-point in these inquiries is most usually the maxim: *In jure non remota causa sed proxima spectatur*; with Lord Bacon's paraphrase:² "It were infinite for the law to consider the causes of causes and their impulsions one of another, therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking for any further degree." Lord Bacon's paraphrase.

What is a *proxima causa*, or immediate cause,³ in law is a matter so largely dependent on the facts of the individual case that any formula of the general principle seems unattainable. It is accordingly advisable to go through the principal cases⁴ which develop the rule of law with far greater clearness than any mere exposition could.

As far back as the time of James I.⁵ it was recognized law that if a horse escape from a field through a gap in a fence, permitted by the negligence of the defendant, and come to injury, the

¹ *Schaeffer v. Jackson*, 30 Am. St. R. 792.

² *Bac. Max. Reg.* i. There is an article on the maxim, 4 Am. Law Review 201.

³ *Steph. Dig. of the Crim. Law*, Arts. 219, 220; *Wharton, Criminal Law*, bk. 1, ch. vii. Causal Connection, §§ 152, 169.

⁴ For a collection of cases on the law generally on this subject, see *Vicars v. Wilcocks*, 2 Sm. L. C. (9th ed.) 577. The various aspects of the maxim in its reference to insurance law are illustrated by *Erle, C.J., Ionides v. Universal Marine Insurance Company*, 14 C. B. N. S. 259. See also the remarks of Lord Selborne, *Inman Steamship Company v. Bischoff*, 7 App. Cas. 670, 676; also per Lord Blackburn, 683; and Story, J.'s judgment in *Peters v. Warren Insurance Company*, 14 Peters 99, 111, where *De Vaux v. Salvador*, 4 A. & E. 420, is examined and questioned.

⁵ *Holbach v. Warner*, Cro. Jac. 665.

Rooth v.
Wilson.

Davis v.
Garrett.

owner can recover. The law was again thus expressed by the Court of King's Bench in the case of *Rooth v. Wilson*,¹ where a gratuitous bailee sued for damages incurred from the death of a horse caused by the neglect of the defendant to fence; and in *Powell v. Salisbury*,² where, under similar circumstances, a horse was killed by the fall of a haystack on defendant's land. But the first case where a general principle is laid down to govern in all cases where injury results, not immediately and obviously arising out of the wrongful act, is *Davis v. Garrett*.³ Defendant's barge had deviated from her accustomed course without justifiable cause, and whilst she was so out of her course, she met with stormy weather and water washed over amongst the lime which formed her cargo and caused a fire. The master was compelled, for the preservation of himself and the crew, to run the barge on shore, where both the lime and the barge were lost. Tindal, C.J., pointed out that the legal consequences must be the same, whether the loss is immediate, as by the sinking of the barge in a heavy sea, when out of her course, or by a connected chain of causes producing the same event. The defendant objected, that there was no natural and necessary connection between the wrong of the master in taking the barge out of her course and the loss itself. The Chief Justice answers this thus:⁴ "No wrongdoer can be allowed to apportion or qualify his own wrong; and as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could shew not only that the same loss *might* have happened, but that it *must* have happened, if the act complained of had not been done."

Walker v. Goe.

*Walker v. Goe*⁵ is the next case, and illustrates the other aspect of the principle. Commissioners were empowered by an Act of Parliament to lease a canal; and were required to give notice to the lessees if during the continuance of the lease the navigation was allowed to get out of repair; and, in case the

¹ (1817) 1 B. & Ald. 59.

² (1828) 2 Y. and J. 391. *Lawrence v. Jenkins*, (1873) L. R. 8 Q. B. 274. There is an obligation for the owner of minerals so to fence that the horses or cattle of the owner of the surface are not injured through falling into excavations. *Groncott v. Williams*, 32 L. J. Q. B. 237. There is no *implied* obligation on the part of a lessor to keep up the fences of closes which he retains in his own hands, and which abut upon the tenant's land, to prevent the tenant's cattle from straying. *Erskine v. Adeane*, L. R. 8 Ch. 756. He must keep his cattle on his land, but is not bound to prevent his neighbour's cattle from straying. *Hilton v. Ankesson*, 27 L. T. N. S. 519. *Ponting v. Noakes*, 10 Times L. R. 444; *post*, 103.

³ (1830) 6 Bing. 716, approved and followed in *Lilley v. Doubleday*, 7 Q. B. D. 511; *Smeed v. Foord*, 1 E. and E. 602.

⁴ 6 Bing. at 724.

⁵ (1858) 3 H. & N. 395, in the Ex. Ch. 4 H. & N. 350.

lessees should make default in executing the repairs pointed out, the Commissioners were further authorized¹ to take possession of the tolls and themselves to do the repairs. The lease having been granted, during its continuance one of the locks of the canal became out of repair; yet the Commissioners, though they knew of the want of repair, gave no notice of it to the lessee, though a sufficient time had elapsed for the giving of such notice. A barge entered the canal while the lock was so out of repair, but was prevented from getting out again by the falling in of the lock. On these facts it was held by the Court of Exchequer, and affirmed by the Exchequer Chamber, that no action lay by the owner of the barge against the Navigation Commissioners. "To Pollock, C.B.'s, judgment. say," says Pollock, C.B., "that the damage could be the consequence of the wrongful act or omission is, in our judgment, to assert a false proposition of law. The surmise is, if the notice had been given the repairs would have been done and the lock would not have fallen in, and so not giving notice caused the lock to fall in. As we have said, this is not proved, but it is not the proximate, necessary, or natural result of not giving notice. The not giving of notice is not sufficient to bring about the result, the giving of it would not be sufficient to hinder it." Wightman, J., Wightman, J.'s, judgment in the Exchequer Chamber. in delivering the judgment of the Exchequer Chamber, thus deals with the same point: "It is argued that if notice had been given the repairs would have been done, and if they had been done the lock would not have fallen in. Suppose, however, the Commissioners had given notice, it does not follow that the lessee would have repaired, and if he did not the Commissioners were not bound to repair. Therefore the falling in of the lock cannot be considered as the natural and necessary consequence of the omission of the Commissioners to give the lessee notice to repair."² Conclusion.

The two above-quoted cases accordingly give the contrasted aspects of what is a natural and probable consequence. On the one hand, it is not sufficient in order to escape liability to shew that the same consequence *might* have happened without the negligence that founds the liability. On the other hand, it is not sufficient to shew that the negligence, and the injury that might flow from it, did exist, without showing that the injury would in ordinary course flow from the negligence.³

¹ "It shall be lawful for the Commissioners, and they are hereby authorized."

² Very like this in principle is *Glover v. London and South-Western Railway Company*, L. R. 3 Q. B. 25, where plaintiff was wrongfully ejected from a railway carriage, and left behind his opera glasses, which he lost, but was disentitled to recover in respect of, because the loss "was not the necessary consequence of the defendants' act, but owing to the plaintiff's own negligence or carelessness."

³ See remarks at the end of judgment of Pollock, C.B., in *Harrison v. The Great Northern Railway Company*, 3 H. & C. 231, at 238.

Lee v. Riley.

Cases relating to horses receiving injury by straying through broken fences have been already given. In *Lee v. Riley*¹ a more complicated state of facts existed. Defendant's duty was to repair the fences of a field where he kept a mare. This duty he neglected, and the mare got through a gap into a field where the plaintiff had a horse, which was kicked by the defendant's mare, and so injured that he had to be slain. The plaintiff was held entitled to recover his value, on the ground that the foundation of the action was the negligence of the defendant in omitting properly to keep up this fence; and that it was through this negligence the defendant's mare strayed from her own pasture; and that it was impossible her owner could know how she would act when coming suddenly in the night-time into a field among strange horses. The distinction drawn by the Court between this and those cases where the question of a ferocious or vicious disposition was raised,² is—in those cases a knowledge is presumed, from the nature of animals, as to their probable conduct; in the present case such knowledge was impossible. This distinction appears at best very flimsy and unsatisfactory. If an animal is *mansuetæ naturæ*, and gives an "unexplained kick," the owner is not liable,³ on the ground that the general disposition of the animal is such that the owner can, without negligence, assume that it will not act in a ferocious manner. If, then, he may assume that, surely he cannot reasonably be held liable when the assumption proves unwarranted, and when there was nothing to lead him to suspect the act to be possible. "It was impossible," says Erle, C.J., "that her owner could know how she would act;" if so, the animal being *mansuetæ naturæ*, the owner was discharged from more than ordinary precautions. The true ground of the distinction between this and the other cases seems to be that here the defendant was guilty of an act of negligence, a result of which was his mare trespassed on the land of his neighbour, and, while a trespasser, did an injury which would certainly have been avoided had the defendant not been negligent;—an injury, too, not so remotely connected with the negligence as to be other than a consequence probably arising out of it, in a case where, apart from defendant, only irresponsible agencies were involved. The defendant's mare being a trespasser through the

¹ (1865) 18 C. B. N. S. 722. In *Ellis v. The Loftus Iron Company*, L. R. 10 C. P. 10, the defendant was held liable in trespass for the injuries done by his horse in biting and kicking the plaintiff's mare through a fence which separated the plaintiff's and defendants' fields, irrespective of any question of negligence on the part of the defendants.

² *Cox v. Burbidge*, 13 C. B. N. S. 430. *Read v. Edwards*, 17 C. B. N. S. 245.

³ *Cox v. Burbidge*, 13 C. B. N. S. 430, per Erle, C.J., 434. The question here is, whether the owner of an animal *mansuetæ naturæ* is liable for an unexplained kick.

defendant's negligence, a presumption arises that the defendant is liable for all acts done during the trespass, unless they are such that, looking to the nature of the trespassing animal, they could be said not to be natural or probable consequences of its disposition. Although, when a horse is in a place where it has a right to be, any disposition to kick that it may suddenly manifest does not import a liability on its owner;¹ when the horse is where it should not be, and kicks, the kicking is not so far remote from what is to be expected from the natural disposition of horses that the injury cannot be said to follow in the natural and obvious sequence from the original wrongful act which allowed the horse to get where an opportunity of doing injury is given.²

If this is the explanation of the case, the decision becomes noteworthy as indicating a distinction all-important for understanding this branch of the law; between acts which are negligent because the injurious results following them are the natural and probable consequences of such acts; and damages which are recoverable because they flow in uninterrupted sequence from negligent acts of which antecedently they could not be considered natural and probable consequences. As will be pointed out later, an act is negligent if the doer of it by thinking might anticipate loss and injury as a natural and probable consequence to some third person with regard to whom or his property he has a duty not to be negligent. Further, the doer of a negligent act is responsible for the consequences flowing from it in fact, even though antecedently, to a reasonable man, the consequences that do flow seemed neither natural nor probable. As Tindal, C.J., shortly states the principle in the Exchequer Chamber, in *Barrow v. Arnaud*, the defendant "should answer for all the loss resulting from his act."³

Distinction between consequences constituting a negligent act, and consequences following a negligent act and the subject of damages.

In the next case, *Hill v. New River Company*,⁴ an open ditch, insufficiently fenced and protected, ran along the highway. The New River Company caused a stream of water to spout on the highway to a height of about four feet above the level of the road. This jet was left unguarded by the servants of the company. The plaintiff's carriage was being driven along the

Hill v. New River Company.

¹ *Hammack v. White*, 11 C. B. N. S. 588.

² The converse case—the duty to refrain from injuring horses trespassing—is considered in *Hurd v. The Grand Trunk Railroad Company*, 15 Ont. App. 58, where horses being on a railroad line, the driver started his engine so soon as they were clear of the line and before they were beyond the influence of fright caused by the noise of the engine. It was held there was no duty. Hagarty, C.J., asks (at 63): Because the engine-driver "miscalculated the extent of the horse's nervousness, and damages resulted, does his conduct therefore amount to actionable negligence?" and adds: "This is one of the strongest illustrations that I remember of the *post hoc propter hoc* doctrine"; he means one of the strongest illustrations of the thus named fallacy.

³ 8 Q. B. 604, at 610.

⁴ (1868) 9 B. & S. 303.

highway between the spouting stream and the ditch; the horses took fright at the spouting stream and, swerving aside, fell into the ditch. The defendants resisted the plaintiff's claim on the ground that the unfenced excavation was the *causa proxima*; but the Court¹ was of opinion that the spouting water was really the *causa causans* of the accident, and that without the negligence of the defendants the accident would not have happened; that being so, they were responsible for its consequences.²

Collins v.
Middle Level
Commissioners.

Collins v. Middle Level Commissioners is a curious case.³ An Act of Parliament authorized commissioners to construct a cut with proper gates and sluices to keep out the waters of a tidal river, and a culvert under the cut for the purpose of draining the lands of the plaintiff and others on the east side of the cut. The Act of Parliament required the culvert to be kept open at all times. In consequence of negligent construction the waters of the river flowed into the cut and, bursting the western bank, flooded the adjoining lands. The plaintiff closed the lower end of the culvert and thus prevented a considerable extent of damage; thereupon the occupiers of the lands on the west side removed the obstruction, and caused a large addition to the water on the plaintiff's land. The defendants contended that the increase being caused by the wrongful act of those who removed the obstruction which the plaintiff had rightfully placed there, the defendants were not liable for the enhanced damage. The Court,⁴ however, held otherwise, upon two grounds. (1) The culvert by Act of Parliament was to be kept open at all times; consequently, those who removed the obstruction were no more wrongdoers than those who placed it there. (2) Even assuming that those removing the obstruction were wrong, "the primary and substantial cause of the injury was the negligence of the defendants; and it is not competent to them to say that they are absolved from the consequence of their wrongful act by what the plaintiff or some one else did." The second ground seems somewhat too broadly expressed. If the owners on the west had removed the obstruction wantonly, without the authority of the Act of Parliament, then their conduct could scarcely be regarded as a natural or probable consequence flowing from the negligent act. Their act takes its colour from the consideration that they were owners, and "imagining that if the neighbouring lands on the east were also overflowed the injury to themselves would be diminished."⁵

¹ Mellor, Lush, and Hannen, JJ.

² For the difference between *causa causans* and *causa causata*, see Earl of Shrewsbury's case, 9 Co. Rep. 50 b.

³ (1868) L. R. 4 C. P. 279. Cp. Corporation of Raleigh v. Williams (1893), A. C. 540.

⁴ Montague Smith and Brett, JJ.

⁵ Per Montague Smith, J., L. R. 4 C. P. 279, at 287.

In *Smith v. London and South-Western Railway Company*¹ the company's servants had cut the grass and trimmed the banks and hedges at the side of the line, and then raked the cut grass and hedge trimmings into heaps between the rails and the hedge, and there left them for a fortnight in extremely hot weather. The heaps became very dry and inflammable, and were set on fire by sparks from one of the company's engines. A high wind prevailed at the time: the fire burnt up the adjoining hedge, passed over a stubble field and a public road, and destroyed the plaintiff's cottage about two hundred yards from the line. On the question whether there was any evidence to go to the jury, Brett, J., in the Court of Common Pleas, thought there was not; for "no reasonable man could have foreseen that the fire would consume the hedge and pass across a stubble field and so get to the plaintiff's cottage at the distance of two hundred yards from the railway, crossing a road in its passage." Bovill, C.J., and Keating, J., held there was evidence: "Under ordinary circumstances it may be that hedges are not expected to ignite; but, if there be collections of grass and hedge trimmings near them in a very dry and inflammable condition, and these by some means become ignited, it may fairly be presumed that the hedges will be in danger, and who is to say where the danger will stop?" "It is not, however, for us to decide whether the injury complained of was a probable consequence of the conduct of the defendants' servants." The dissent of Brett, J., is to the proposition that, admitting the negligence that produces the fire, the destruction of the cottage at a distance of two hundred yards was a natural and probable consequence of the fire. The two other judges decided that the conduct of the servants of the company in leaving the dry heaps by the side of the railway so long was evidence of negligence, and that what are probable consequences from negligence are matters for the jury. The judges of the Exchequer Chamber adopted this latter view.

Smith v. London and South-Western Railway Company.

Brett, J.'s view.

Judgment of the Court of Common Pleas. Bovill, C.J., and Keating, J.

In the argument in the Exchequer Chamber much stress was laid by the defendants on the *dictum* of Bramwell, B., in *Blyth v. Birmingham Waterworks Company*:² "It would be monstrous to hold the company liable for negligence because they did not foresee an event that was so remote from probability that for

Judgments in the Exchequer Chamber.

¹ (1870) L. R. 5 C. P. 98, in the Ex. Ch. L. R. 6 C. P. 14. Cp. *Webb v. Rome, &c., Railroad Company*, 49 N. Y. 420; also the opinion of Christiancy, J., in *Hoyt v. Jeffers*, 30 Mich. 200, cited in Wharton, *Negligence*, § 155; in *Admiralty, The Mellona*, 3 W. Rob. 7, and the *Canadian Case, Canada Southern Railway Company v. Phelps*, 14 Can. S. C. R. 132, at 148, per Henry, J.

² 11 Ex. 781, 785: "Reasonable and probable" consequences are considered in *Bellamy v. Wells*, 60 L. J. Ch. 156, where, in consequence of pugilistic entertainments at a club late at night, crowds collected and noise was occasioned; see also *Barber v. Penley* (1893), 2 Ch. 447.

Channell, B.'s,
 explanation of
 Bramwell, B.'s,
dictum.

Channell, B.'s,
 view adopted
 by Black-
 burn, J.

And the rest
 of the Court.
 Blackburn,
 J.'s, doubt.

Considered.

many months it could not be found out what was the cause of the injury to the plaintiff's premises." This Channell, B., in giving judgment, explained thus: "I quite agree that where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, and this is what was meant by Bramwell, B., in his judgment in *Blyth v. Birmingham Waterworks Company*; but when it has been once determined that there is evidence of negligence the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not."¹ And this opinion was adopted by Blackburn, J., in his judgment: "What the defendants might reasonably anticipate is," said he, "only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence." "If the negligence were once established, it would be no answer that it did much more damage than was expected. If a man fires a gun across a road, where he may reasonably anticipate that persons will be passing, and hits some one, he is guilty of negligence, and liable for the injury he has caused; but if he fires in his own wood, where he cannot reasonably anticipate that any one will be, he is not liable to any one whom he shoots, which shows that what a person may reasonably anticipate is important in considering whether he has been negligent; but if a person fires across a road when it is dangerous to do so and kills a man who is in the receipt of a large income, he will be liable for the whole damage, however great, that may have resulted to his family and cannot set up that he could not have reasonably expected to have injured any one but a labourer." On this all the Court² was agreed. Blackburn, J., however, doubted "whether, since the trimmings were on the verge of the railway on the company's land, if the quickset hedge had been in its ordinary state they might not have been burned only on the company's premises, and done no further harm, and whether the injury, therefore, was not really caused by the hedge being dry, so that it caught fire, and by the fire thus spreading to the stubble field and thence to the plaintiff's cottage."

The decision of this case establishes that, when negligence is once shown to exist, it carries a liability for the consequences arising from it whether they be greater or less until the intervention of some diverting force, or until the force put in motion

¹ L. R. 6 C. P. at 21.

² Consisting of Kelly, C.B., Martin, B., Bramwell, B., Channell, B., Blackburn, J., Pigott, B., and Lush, J.

by the negligence has itself become exhausted.¹ In discussing it confusion has been caused by not separating the two points which were mainly argued: (1) Was there any evidence of negligence to leave to the jury; (2) if there was evidence of negligence to go to the jury, for how many of the consequences flowing from the negligence were the defendants liable? It was with respect to the first point only that any doubt was felt by the judges—excepting Brett, J. The doubt may be thus stated—the defendants being authorized by Act of Parliament to run engines on their line, and the emission of sparks being necessarily incidental to doing so, the mere fact of fire thence arising would not affect them with liability apart from negligence; while, in an ordinary season, the heaping of cuttings along the line would not in natural and probable sequence produce the fire. Bearing these two facts in mind, was the heaping of cuttings along the line in a way that in ordinary circumstances would not kindle fire from sparks alighting, evidence of negligence when done in a season of exceptional dryness, when fire might be caused by them in ordinary course, if a spark alighted? And again, it being matter of common knowledge that engines do emit sparks, was there evidence for the jury that the fire originated in sparks from one of the company's engines? Was the duty of the railway company limited to taking ordinary precautions in extraordinary times, or did their duty extend to guarding against perils both ordinary or extraordinary, if by the exercise of care and forethought they could foresee them?² On the second point, in the Exchequer Chamber at any rate, there was no doubt at all. Yet some writers, by transferring the doubt on the first point to the decision on the second, have been landed in perfectly unnecessary difficulty in discriminating the natural consequences of a negligent act, for which a wrongdoer is liable in damages;³ since it is clear from the judgments that no discrimi-

¹ The American case of *Haverly v. State Line, &c., Railroad Company*, 135 Pa. St. 50; 20 Am. St. R. 848, is very similar. See, too, *Ehrgott v. New York*, 96 N. Y. 264, where a man recovered for injuries suffered from a defect in a highway, resulting, months after, in a spinal disease.

² See *Daniel v. Metropolitan Railway Company*, L. R. 5 H. L. 45, per Lord Hatherley, C., at 56.

³ The expressions used by Lord Esher, M.R., in stating the rule of law, applied indeed to a very different class of cases, do not seem accurate. In *In re London, Tilbury and Southend Railway Company and Trustees of Gower's Walk Schools*, 24 Q. B. D. 326, at 329, he is reported as saying, "the rule seems to me to be that where a plaintiff has a cause of action for a wrongful act of the defendant, the plaintiff is entitled to recover for all the damages caused which was the direct consequence of a wrongful act, and so probable a consequence that, if the defendant had considered the matter, he must have foreseen that the whole damage would result from that act." This is the very proposition he laid down and which was overruled in *Smith v. London and South-Western Railway Company*. It has been before pointed out that there are two inquiries in the application of the test of what is a natural and reasonable consequence: 1st, an inquiry whether the act causing injury was wrongful; that

nation is admissible, and that, negligence being shewn, the person guilty is answerable for all the consequences "whether he could have foreseen them or not."

Bailiffs of
Romney Marsh
v. Trinity
House.

Bailiffs of Romney Marsh v. Trinity House¹ accentuates the decision in Smith v. London and South-Western Railway Company, with which it was almost contemporaneous. Defendants' vessel being driven upon a seawall became a wreck and could not be removed without breaking her up. To do so would have caused valuable property on board to be sacrificed. The defendant first removed the property with all reasonable speed and then broke up the vessel. While the work of unloading was going on increased damage was done to the wall. The defendants' contention was that they were only liable for the original negligence and not for the damage done while the ship was on the wall and

being established, then, 2nd, what are the actual continuous consequences of the wrongful act? The liability is determined by looking *a post* not *ab ante*. The defendant's view of the possibilities of his act is very material to determine whether his act is negligent or not; it is utterly immaterial to limit liability when once negligence has been established. Cp. The Lincoln, 15 P. Div. 15. According to the formula in the Gower's Walk Schools case, it would, for example, have been hard for the plaintiff to have recovered in Gilbertson v. Richardson, 5 C. B. 502. Defendant's carriage was driven against the wheel of plaintiff's chaise, the collision threw a person who was in the chaise upon the dashing board, the dashing board fell on the back of the horse, the horse kicked and injured the chaise; it was held that the plaintiff could recover for the whole series of misadventures. Of course, the comment on such a case as this is, that liability is to be considered, from the point of whether any particular result antecedently probable is brought about, independently of the precise steps by which it is arrived at, and not from the point of in what manner anything may be brought about. Again, in the Supreme Court of the United States, in Smith v. Bolles, 132 U. S. (25 Davis) 125, at 130, it was laid down that damages must always be the natural and proximate consequence of the act complained of, and the test was adopted "that those results are proximate which the wrongdoer from his position must have contemplated as the probable consequence of his fraud or breach of contract." This does not seem satisfactory if for no other reason, yet for that given in the Year Book, 17 Edw. IV. 2, pl. 2, *car comen erudition est qui l'entent d'un home ne serra trie, car le diable n'ad conusance de l'entent de home*. Who can say what the wrongdoer contemplated? and, if a stupid wrongdoer, he probably contemplated nothing or little. The rule in Paisley v. Freeman 3 T. R. 51, seems less open to objections: Wherever a man wickedly asserts that which he knows to be false, and thereby draws his neighbour into a heavy loss, *he is responsible for it, or for so much of the loss as was the necessary, natural, or probable and known consequences* of the misrepresentation, or as it has been otherwise expressed, "all the loss naturally and necessarily flowing from the wrongful act or default." See also Harrison Ainslie and Company v. Muncaster (1891), 2 Q. B. 680. In Harris v. Cameron, 29 Am. St. R. 891, the question was considered of the responsibility of a person giving a child dangerous toys whence injury results. The conclusion arrived at, which seems correct, is, that there is no such liability where the injury arises from the abuse and not from the use of the article in question—in the case under consideration, an air-gun. Two questions were considered: 1. was the defendant guilty of an act of negligence in buying an air-gun? 2. if so, could he have reasonably anticipated a dangerous and improper use of it? Both were answered in the negative. A liability was held to exist where a dangerous substance was not kept out of the reach of boys at school, when injury resulted from one taking it and causing an explosion, which injured a playfellow, in respect of whose injuries action was brought. (Williams v. Eady, 9 Times L. R. 637, affirmed (C.A.) 10 Times L. R. 41.) The distinction between the cases seems to be in the one case, a boy was given a proper plaything, whose use he abused; in the other, a boy was not prevented meddling with what was dangerous and not a plaything.

¹ (1870) L. R. 5 Ex. 204, in Ex. Ch. L. R. 7 Ex. 247. Cp. The Douglas, 7 P. D. 151; The George and Richard, L. R. 3 A. & E. 466.

the property was being removed; because it was not reasonable to break up the ship while containing valuable property, and reasonable care was all the defendants were bound to observe. The fallacy of this contention is that it assumes the consequences of the negligence of the defendants to terminate when once the ship was on the wall, and the wall was being injured by the bumping on it through the action of the waves and tide, and no longer by the force of the impact; whereas the injuries inflicted were direct consequences of the negligence in allowing the ship to get on the wall. Between the decision in the Exchequer and the hearing in the Exchequer Chamber, *Smith v. London and South-Western Railway Company* was decided in the Exchequer Chamber and the law was established to be that, "if the negligence were once established it would be no answer that it did much more damage than was expected."¹ That being so the defendants were liable for all the attendant consequences. So long as the original wrongful position of the ship continued, the ship, coming on the wall wrongfully, was not rightly there because she continued to stay there. Had the ship been on the wall without any fault of the defendants, the consideration of a wholly different set of circumstances arises. In that case, since the defendants would not be in default, the maxim that loss lies where it falls would apply. A duty to remove the ship in a reasonable time and manner would attach to its owners, and till default in this no liability for damage to the wall could arise.² The view the defendants sought to impress on the Court was that they, being exonerated if the ship had got on the wall without negligence, were equally exonerated for the consequences after she was resting on the wall, though she got there negligently; it failed because of the absence of any responsible agency, between the original negligence and the completion of the mischief, to divert or dispel its effects.

*Wilson v. Newberry*³ was decided on demurrer. It was an attempt to establish a duty on the defendant to prevent the clippings of his yew trees, which were poisonous to cattle, and actually caused the death of the plaintiff's horses by eating of them, from being placed upon land other than that occupied by the defendant. The analogy sought to be established was with the case of *Fletcher v. Rylands*;⁴ the Court refused to recognize any such analogy, and the more so as, by the terms of the declaration, the duty sought to be established was not only to

*Wilson v.
Newberry.*

¹ Per Blackburn, J., L. R. 6 C. P. 14, at 22.

² See judgment, Kelly, C.B., on second count of the declaration, L. R. 5 Ex., at 207.

³ (1871) L. R. 7 Q. B. 31. *Ponting v. Noakes*, 10 Times L. R. 444.

⁴ L. R. 3 H. L. 330.

prevent the clippings from escaping on to his neighbour's land, but was so broadly expressed as to cover the case of their being placed there by a stranger.

Sharp v.
Powell.

Next comes the interesting case of *Sharp v. Powell*.¹ Defendant's servant, in breach of the Police Act,² washed a van in the public street; the waste water ran down the gutter towards a grating leading to a sewer some few yards off. The grating was frozen over, and the water, after flowing for some way, froze also. The plaintiff's horse, while being led along the road, slipped on the ice and broke his leg. At the trial the plaintiff was nonsuited, and the Court of Common Pleas upheld the decision of the judge at the trial on the ground that "the act of the defendant was not the ordinary or proximate cause of the damage to the plaintiff's horse, or within the ordinary consequences which the defendant may be presumed to have contemplated or for which he is responsible."³ Grove, J., then goes on to say: "The expression the 'natural' consequence, which has been used in so many cases, and which I myself have no doubt often used, by no means conveys to the mind an adequate notion of what is meant; 'probable' would perhaps be a better expression."

Consideration
of the case.

(The act of the defendant in washing his van in the public street was wrongful as against the public, though not an act in itself conferring any right of action on a private individual.⁴) If the water had at once formed a puddle and frozen, and the accident had followed on the spot where the negligence had been committed, the plaintiff would probably have been held entitled to recover, not by virtue of the Police Act, but because of a nuisance on the highway from which the plaintiff sustained particular damage. When the water had flowed away and had run into the channel provided for waste water, the natural and probable effects of the plaintiff's act were exhausted. This being so, before the constitution of a wrongful act as against the plaintiff, the defendant's responsibility had terminated. Subsequently, and by another cause, an impediment was interposed to the flow of the water. The question then arose whether there was any duty on the defendant, after seeing that

¹ (1872) L. R. 7 C. P. 253. Compare the two cases, *Singleton v. Eastern Counties Railway Company*, 7 C. B. N. S. 287; *Williams v. Great Western Railway Company*, L. R. 9 Ex. 157, in one of which there was, and in the other there was not, a negligent act proved.

² 2 & 3 Vict. c. 47, s. 54.

³ Per Grove, J., L. R. 7 C. P. 253, at 259.

⁴ An act may be negligent judged by an abstract standard; it is not an actionably negligent act (1) till it inflicts injury on some other person; and (2) such injury is a natural and probable result to be foreseen by a reasonable person at the time of acting.

the water placed on the public road by his wrongful act had flowed away, to trace it along its course. The Court held that there was no such duty; for that when the water had got into its natural course the consequences of his wrongful act ceased. This implies that the mere act of throwing water down the gutter was lawful; if otherwise, the effect of the wrongful act would have been continuous, and the decision probably different.

Sir Frederick Pollock prays *Sharp v. Powell* in aid of the rule of law he supports in this connection.¹ His view is, as formulated by Pollock, C.B., in *Greenland v. Chaplin*:² "that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur." In considering this rule the distinction pointed out in *Smith v. The London and South-Western Railway Company* in the Exchequer Chamber³ must be kept in view—between those consequences which happening subsequently to an act give the act the colouring of negligence, and those consequences which follow in uninterrupted course on an act by a previous inquiry ascertained to be a negligent one.

View taken of
Sharp v.
Powell in
Pollock, *Torts*,
considered.

In *Sharp v. Powell* the question was whether the defendant was guilty of a wrongful or negligent act with regard to the plaintiff. The accident was caused through water freezing over a grating down which it would have flowed "if the drain had not been stopped and the road had been in a proper state of repair." So far there is no negligent or wrongful act shewn on the defendant's part; for "he had a right then to expect that the water would flow down the gutter to the sewer in the ordinary course; and but for the stoppage (for which the defendant is not responsible) no damage would have been done." The right to pour water down the gutter is apparently conceded, and till a wrongful act is established against the defendant no question of consequences near or remote can arise. To meet this difficulty an act contravening the Police Act is alleged. Now this fails of effecting the object sought in alleging it, on two grounds: (1) as a wrongful act against the Police Act, it gives no rights against the defendant;⁴ and (2) there is no actionable negligence where

¹ *Torts* (3rd ed.), 43.

² (1850) 5 Ex. 243, at 248. Compare what the same learned judge says in *Rigby v. Hewitt*, 5 Ex. 240, at 243: "Where an injury arises from the misconduct of another, the party who is injured has a right to recover from the injuring party for all the consequences of that injury." *Hughes v. Quentin*, 8 C. & P. 703, does not seem correct. See, however, *Greenbirt v. Smee*, 35 L. T. 168, at 172; and *Mayne, Damages* (5th ed.), 402, where it is adopted as good law.

³ L. R. 6 C. P. 14.

⁴ Per Bovill, C.J., L. R. 7 C. P. 253 at 259.

⁵ The case is on this point analogous to the American Sunday Travelling Cases:

Cockburn,
C.J.'s, state-
ment of the
law.

though there is an apparent indisposition to state any formula embracing the principle governing their decision. However, after quoting the judgment of Bovill, C.J., in *Sharp v. Powell*,¹ Cockburn, C.J., says: "At the same time, it appears to us that the case before us will stand the test thus said to be the true one. For, a man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction by some one entitled to use the way as a thing likely to happen; and, if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near: thus, if the obstruction be to the carriage-way, it will very likely be placed, as was the case here, on the footpath. If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of damage, from which, should injury to an innocent party occur, the original author of the mischief should be held responsible. Moreover, we are of opinion that if a person places a dangerous obstruction in a highway or in a private road over which persons have a right of way, he is bound to take all necessary precaution to protect persons exercising their right of way, and that if he neglects to do so he is liable for the consequences."²

The law
discussed.

Clark v. Chambers differs from *Sharp v. Powell* in this, that in *Clark v. Chambers* there was a wrongful act as against the plaintiff. The defendant had no right to place his *cheval de frise* anywhere on the footway. So long then as it was there it was a continuing wrongful act. When some other person removed it out of the position in which the defendant had placed it, because, while in that position it interfered with his rights, he was doing no more than he was entitled to do. If he had set a trap for the plaintiff and had done a wilful and malicious act, another aspect of the case would be presented; in merely removing an obstruction from his path he was in the circumstances acting after the course indicated in *Scott v. Shepherd*, and the defendant's act remained no less wrongful subsequently to the removal of the *cheval de frise* than when the *cheval de frise* was in the position he originally gave it. The having it on the way was the wrongful and negligent act, and when actual injury

appears to confuse the judgment of the dissenting judge, Blackstone, J., who held that Willis and Ryal "both were free agents and acted upon their own judgment," with the judgment of the Court, see per Gould, J.: "The terror impressed upon Willis and Ryal excited self-defence, and deprived them of the power of recollection. What they did was therefore the inevitable consequence of the defendant's unlawful act. . . . What Willis and Ryal did was by necessity, and the defendant imposed that necessity upon them." It is not the accident of being a person, but the essence of being a free agent, that is to be regarded.

¹ L. R. 7 C. P. 253.

² 3 Q. B. D. 327, at 338.

resulted the defendant became liable for the consequences. In *Sharp v. Powell*, on the other hand, there was no wrongful act. The van was not on the highway, The water used in washing it had flowed away. The frozen water which was alleged as the cause of the injury, was so far as the defendant was concerned, lawfully where it was—over the gully—when the accident happened. In the words of Lord Bacon, “it were infinite for the law to consider the causes of causes and their impulsions one of another.”

*Metropolitan Railway Company v. Jackson*¹ is on the same lines. The decision there is that the defendants' act was not a negligent one in the sense in which it was complained of; the consequences alleged did not flow from it, but from something else, and so there was no foundation laid by the plaintiff for his claim.² The detailed consideration of this important case must, however, be postponed.

This brings us to the consideration of the American rule. In *Insurance Company v. Tweed*,³ the facts shewed that cotton in a warehouse was insured against fire, the policy containing an exception against fire happening “by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, *explosion*, earthquake,* or hurricane.” An explosion took place in another warehouse situated directly across a street which threw down the walls of the first warehouse and scattered burning embers about. The fire was not communicated directly from the warehouse in which the explosion took place to the warehouse where the cotton was, but came more immediately from a third building which was itself fired by the explosion. Wind was blowing (with what force did not appear) from this third building to the one in which the cotton was stored. The whole fire was, however, a continuous affair from the explosion, and under full headway in half an hour. In holding the cause an explosion within the exception in the policy, the Court said: “We have had cited to us a general review of the doctrine of

¹ (1877) 3 App. Cas. 193.

² *Cowell v. Mumford*, 3 Times L. R. 1, depends on a special fact. The defendant's dog attacked the mare of the plaintiff while plaintiff was driving her in a gig. The mare fell and was injured, as was also the gig, the plaintiff, and his clothes. Bowen, L.J., held that the plaintiff could only recover for the damage done by the dog to the mare. This, though it does not appear from the report, was probably on the ground that the only right of action where *scientia* of the disposition of the dog is not proved, is under the Act 28 & 29 Vict. c. 60, s. 1, the words of which are: “The owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog.” The damages were thus limited to injury done to the mare. *Glover v. London and South-Western Railway Company*, L. R. 3 Q. B. 25, is a case where loss arising out of a wrongful act is not legally a consequence of the act, and so not a subject of damages.

³ 7 Wall. (U.S.) 44, at 52. In *Sheffer v. Railroad Company*, 105 U.S. (15 Otto) 249, this case is said to have gone “to the verge of the sound doctrine.”

proximate and remote causes as it has arisen and been decided in the Courts in a great variety of cases. It would be an unprofitable labour to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discrimination. One of the most valuable of the criteria furnished by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote. In the present case we think there is no such new cause. The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another building supplies no new force or power which caused the burning. Nor can the accidental circumstance that the wind was blowing in a direction to favour the progress of the fire towards the warehouse be considered a new cause." X

Milwaukee, &c.,
Railroad Com-
pany v.
Kellogg.

In the next case,¹ the plaintiff's mill and timber were burned as a consequence of the burning of a grain elevator, which was set on fire by the negligence of those on board defendants' steamer. "The true rule," said the Court, "is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact in view of the circumstances of fact attending it." "The question always is, Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Scheffer v.
Railroad Com-
pany.

In *Scheffer v. Railroad Company*,² through the negligence of the defendant company, a passenger was so injured that he became insane, and, eight months after the accident, committed suicide. An action brought by his personal representative was defeated

¹ Milwaukee and St. Paul Railroad Company v. Kellogg, 94 U.S. (4 Otto) 469, at 474.

² 105 U.S. (15 Otto) 249.

on the ground that deceased's own act being the proximate cause of his death the defendants were not liable. In giving judgment the Court said: "The proximate cause of the death of Scheffer was his own act of self-destruction. It was within the rule in both these cases (*i.e.*, the two cases already cited) a new cause and a sufficient cause of death. The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident of the railroad. Such a course of possible, or even logical argument, would lead back to that 'great first cause least understood,' in which the train of all causation ends."

One must pause to comment on the statement here made. If Considered. any course leads back to the "great first cause" without interruption, no negligence can have counteracted it, and no liability can have been incurred in its progress. The whole point of the case under consideration is that an act out of due course—the negligence of the defendants—had deranged the sequence of effects; in which event the consequences of the derangement would affect those inducing them with liability. But the Court seem to shrink as well from tracing an effect back step by step to its first cause as from tracing an act of negligence to its ultimate catastrophe. Yet since in the one case, whatever the result, if it is brought about by natural agencies without a negligent intervention, liability can be transferred to no one; so in the other it would seem that an act arising from negligence, and due to it, should not be divested of the consequences merely because they are postponed; that is, if it can be shewn that they are direct and natural consequences, not attributable to the intervention of any other accountable agent. A wrongdoer clearly ought not to escape the consequences of his action because he works by circuitous contrivances and refrains from simply producing the injurious result.

The judgment then continues: "The suicide of Scheffer was Judgment of
the Court con-
tinued. not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train. His insanity as a cause of his final destruction was as little the natural and probable result of the negligence of the railway officials as his suicide, and each of these as casual or unexpected causes intervened between the act which injured him and his death." If this is a correct expression of Considered. the American doctrine, it certainly is not in accord with the

English doctrine as laid down by Blackburn, J., in *Smith v. London and South-Western Railway Company*.¹ If disease is produced by a railway accident, and suicide is the result of disease, neither can be looked upon as 'casual or unexpected causes.' They are both the natural outcome of the injuries arising from the accident. True, to take the latter of them, the suicide might be the voluntary expression of the sufferer's despair at his desperate state. In that case there would be the intervention of a conscious agency, which diverts the course of the disease; then there would be no liability on the defendants for an act not necessarily and unaided growing out of their wrongful act. But whether the suicide were the effect of the disease, or whether it were the voluntary act of an, at least, partially responsible agent would be a matter for a jury to pass its opinion on. From the English point of view in the former case the defendants would not, in the latter they would, be discharged.²

Injury to a delicate person.

The considerations we have been examining apply also to the case where the injuries inflicted are the more severe from the fragility of the sufferer, or from his suffering from a disease at the time of the injury which intensifies its consequences. In this case, in the United States, the rule laid down by Messrs. Shearman and Redfield³ has been adopted: "Though the plaintiff be afflicted with a disease or a weakness which has a tendency to aggravate the injury, defendant's negligence will still be held to be the proximate cause; and the defence that the sufferer died from an independent disease is not made out, unless it is clearly shewn that death must have ensued independently of the injury."⁴ There does not appear to be any English case stating this in terms, yet the conclusion accords with English principle.⁵

Injury aggravated by wrong treatment.

Closely related to these cases are those where the injury sustained is alleged to be aggravated by a refusal to submit to treatment or to some particular treatment. Here, again, there are no English authorities in point to guide us. In a New York case, however,⁶ it was contended that the plaintiff should not be allowed to recover because the injured man, plaintiff's intestate, at first rejected the advice of his physician and refused to have his leg

¹ L. R. 1 C. P. 98, in the Ex. Ch. L. R. 6 C. P. 14.

² The authorities are most ably examined in *McDonald v. Snelling*, 96 Mass. 299, at 293, a case upon the consequences following a horse running away.

³ *Negligence*, 4th ed. § 742. *Louisville, &c., Railroad Company v. Snyder*, 10 Am. St. R. 60, see note 64-66.

⁴ Cp. *State v. Landgraf*, 6 Am. St. R. 26; see 27 Sc. L. R. 20.

⁵ *Isitt v. Railway Passengers' Assurance Company*, 22 Q. B. D. 504.

⁶ *Sullivan v. Tioga Railway Company*, 112 N. Y. 643, 648, 8 Am. St. R. 793.

amputated as he was advised. The Court considered that if the refusal was fatal to the patient the defendant had no cause to complain, for death limits a verdict to a less sum than a jury might think proper to award to a living but crippled man. On the general question the opinion was that: "It certainly cannot be said as matter of law that a patient may not, without imputation of negligence, trust to natural results without the complication of scientific experiments." And it cannot be laid down, as matter of law, that no refusal to accept medical or surgical help will disentitle him to recover. Indeed, the case is not impossible in which the very effect of the accident is a nervous perturbation that forbids the performance of operations which in health might be submitted to without risk or undue anxiety. While, on the one hand, the act of the sufferer who tears the bandages from wounds in their nature not serious, and bleeds to death as the direct result, would disentitle his representatives to recover in respect of more than the ordinary and natural results of the injuries inflicted; so, on the other hand, those responsible for an injury would derive no mitigation of their liability from the sufferer refusing to submit to some severe operation with balanced probabilities of a fatal issue or of recovery. The only rule that seems applicable is that each case must be left to the jury on its merits, with a direction to consider whether the particular conduct in fact conduced to the death or aggravated injury; and in the event of the jury being of opinion that such was the result, to say further whether the conduct of the sufferer was justifiable in the particular circumstances, regard being had to the mental and bodily condition to which he has been reduced by the wrongful act of the defendant.¹ Wilful aggravation of an injury would, of course, disentitle the guilty person to recover in respect of it; while aggravation arising from ignorance alone will not be effectual. There is, indeed, a duty on an injured person not wantonly, carelessly, or needlessly to do any act which would aggravate his injury. But he has other duties incumbent on him as well, and a defendant cannot shift his responsibility by shewing mere defect of judgment in the plaintiff. For example, a workman injured apparently only slightly is not required by any principle of law to abandon his work and lay by, sacrificing his earnings, and putting his family to privations in order cheaply to exonerate the wrongdoer from possible developments of the injury his

¹ There is a note on the special duty of a railway company to take care of sick, aged, or feeble passengers, *New Orleans Railroad Company v. Statham*, 97 Am. Dec. 499.

wrongdoing has caused. If from not laying by in time serious consequences develop, the determination of whether these are the natural outcome of the defendant's wrongful act or the product of the plaintiff's own contributory negligence, must be governed by the consideration whether plaintiff's action was due to mistaken judgment or to want of good faith. In the former case the defendant (subject to the verdict of a jury) is responsible; in the latter he will be discharged from liability.¹

Injured person not bound to employ surgeon of greater than "ordinary skill."

It follows from what has been said, that an injured person is not bound to employ the most skilful surgeon who can be found, nor yet to incur lavish expenditure of any kind in the treatment of the injuries he has sustained. If his medical man treats him erroneously, no claim to exoneration of the wrongdoer from full liability is thereby established, if only the medical man employed is of good standing and repute. As was said in one case,² the plaintiff is not bound to insure not only the surgeon's professional skill, but also his immunity from accident, mistake, or error in judgment.³

III. DAMAGES.

Consideration whether there is any difference in the rule of law as it has to deal with contracts.

Hadley v. Baxendale.

The rule we have hitherto been considering deals with the consequences of tortious acts; the liability for breach of contract can usually be more definitely marked.⁴ There, as a general rule, the primary and immediate result is alone to be looked to. Thus, in the case of non-payment of money, no matter what the inconvenience sustained by the plaintiff, the measure of damage is no more than the interest of the money.⁵ With regard to the limitation of liability in the case of contract, there is consequently not the difficulty that arises in cases of torts. The leading case of *Hadley v. Baxendale*,⁶ is invariably referred to on this head of law. There the Court said: "We think the proper rule . . . is this: where two parties have made a contract which one of

¹ *Foels v. Tonawanda*, 59 Hun. (N. Y.) 567.

² *Stover v. Bluehill*, 51 Me. 439.

³ *Lyons v. Erie Railroad Company*, 57 N. Y. 489; *Loeser v. Humphrey*, 52 Am. R. 86. See the remarks of O'Brien, J., *Byrne v. Wilson*, 15 Ir. C. L. R. 332, 342, 343.

⁴ *Mayne, Damages* (5th ed.), 10.

⁵ Per Willes, J., *Fletcher v. Tayleur*, 17 C. B. 21, at 29.

⁶ 9 Ex. 341, at 354. For what are damages that the parties would "reasonably contemplate," see *Hammond & Co. v. Bussey*, 20 Q. B. D. 79, where *Baxendale v. London, Chatham, and Dover Railway Company*, L. R. 10 Ex. 35 is distinguished. In *Lepia v. Rogers* (1893), 1 Q. B. 31, at 37, Hawkins, J., says: "It is not in my opinion essential to prove that the damage (i.e., from breach of covenant) *must inevitably follow such breach*; it is sufficient to show that it was a probable and not unlikely result." For some valuable remarks on general and special damages, see the judgment of Bowen, L.J., *Ratcliffe v. Evans* (1892), 2 Q. B. 524. *McLaurin v. North British Railway Company*, 19 Rottie 346, is a Scotch case on the elements proper to consider in assessing damages for personal injuries. Future damages may be estimated, *Washington and George Town Railroad v. Harmon*, 147 U. S. (40 Davis) 571.

them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally¹—i.e., according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract—as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.”²

This exposition was intended to settle the law,³ and has been adopted both here and in America. In a later case⁴ it has been summarized into three inquiries, as follows: “First, whether the damage is the necessary consequence of the breach; secondly, whether it is the probable consequence; and, thirdly, whether it was in the contemplation of the parties when the contract was made. Those two last are rather questions of fact for a jury, than of law for the Court to determine.” With regard to the last consideration there stated, Cotton, L.J., in the same case

Summarized
in three
inquiries.

¹ “Great difficulty,” says Grove, J., in *Smith v. Green*, 1 C. P. D. 92, at 96, “no doubt arises from the use of the word ‘natural’ in these cases. It is used by Lord Campbell and by Erle, J., in *Randall v. Raper* (E. B. & E. 84), and has been used in many cases; and it may not be easy to substitute a better word to express what is meant. Normal, or likely, or probable of occurrence in the ordinary course of things, would perhaps be the more correct expression.”

² What is said as to notice must be taken in connection with the opinion of the majority of the Ex. Ch. in *Horne v. Midland Railway Company*, L. R. 8 C. P. 131, and the judgment in *Elbinger Actien Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473, to which Lush, J., who dissented in *Horne’s* case, was a party. See the judgment of the Court of Appeal in *The Parana*, 2 P. Div. 118, delivered by Mellish, L.J.; also *Grébert-Borgnis v. Nugent*, 15 Q. B. Div. 85.

³ Per Pollock, C.B., *Wilson v. Newport Dock Company*, L. R. 1 Ex. 177 at 189. The leading case in America is *Griffin v. Colver*, 16 N. Y. 489; *Sedgwick, Lead. Cas. on the Measure of Damages*, 269. *Western Union Telegraph Company v. Hall*, 124 U. S. (17 Davis) 444.

⁴ Per Brett, L.J., in *McMahon v. Field*, 7 Q. B. Div. 591, at 595, questioning *Hobbs v. London and South-Western Railway Company*, L. R. 10 Q. B. 111.

Parties to contracts contemplate their performance not their breach.

pointed out a necessary modification—that since parties to contracts in making them usually contemplate their performance and not their breach, the rule should rather be expressed, “that the damage recoverable is such as is the natural and probable result of the breach of contract.”¹ The same consideration had long previously been even more forcibly insisted on by Martin, B., in *Prehn v. The Royal Bank of Liverpool*:² “Special damages are given in respect of any consequences reasonably or probably arising from the breach complained of. The test has been put in another form, namely, that they must be such as a court or jury may reasonably consider to be those which the parties would certainly contemplate. I do not believe that to be the true test; for those who make contracts mean to fulfil them; it is therefore idle to enter into the consideration of what will happen if the contract is broken.”

Rule the same in contract and tort.
The Notting Hill.

The point whether there is any difference between the measure of damage in contract and the measure of damage in tort was distinctly raised in *The Notting Hill*,³ where Lord Esher, M.R., with the concurrence of the rest of the Court, denied the existence of any different principle whatever. That was an action for damages caused by collision at sea, where an attempt was made to obtain damages for loss of market. The Court in deciding against the claim followed *The Parana*,⁴ where it was held that “in all such speculative uncertain cases damages ought not to be recovered.” The inquiry was, What damages were the defendants liable for? The answer was those naturally and probably flowing from the breach; but loss of market was too remote a consequence, and so not recoverable. Thus the principle referred to as identical in contract and tort is the principle that governs in determining the liability. There is then the second inquiry that assumes a liability and traces its consequences. This second inquiry is not applicable in the case of breach of contract;⁵ because the consequences of performing the contract being in law foreseen between the parties, when the contract is not performed, the consequences of the breach must be judged by the same standard. In contract no consequences beyond those that may be presumed in the mind of a reasonable man at the time of entering on the contract can be accounted of. In tort the rule is the same in determining whether an act imports actionable negli-

¹ The judgment of Earl, J., *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. R. 622, is very instructive on what are “natural and proximate” consequences.

² L. R. 5 Ex. 92 at 100.

³ 9 P. Div. 105.

⁴ 2 P. Div. 118.

⁵ See per Brett, M.R., citing *Mayne, Damages* (3rd ed.), 39, (5th ed.) 47; *The Notting Hill*, 9 P. Div. 105, at 113.

gence or not. After this stage the rules diverge. In contract no other damages can be recovered unless specially. In tort the negligent consequences run their course, though they could not be anticipated. Damages that could not be antecedently anticipated are not recoverable in contract.

The law was fully considered in *The Argentino*;¹ where a ship, *The Argentino*, under an engagement to collect cargo at Antwerp to go to Batoum, in consequence of a collision was, necessarily, put under repair, and thus lost her engagement. Sir J. Hannen was of opinion that the owners of *The Argentino* were entitled to prove the loss of the freight from their anticipated journey, and to recover it as part of the damage arising out of the collision. In holding this, Sir J. Hannen followed Dr. Lushington in *The Clarence*,² who thus stated the principle: "It does not follow as a matter of necessity that anything is due for the detention of a vessel whilst under repair. Under some circumstances, undoubtedly, such a consequence will follow, as for example where a fishing voyage is lost, or where the vessel would have been beneficially employed. The *onus* of proving her loss rests with the plaintiff, and this *onus* has not been discharged on the present occasion. Had the owners of *The Clarence* proved that the vessel would have earned freight, and that such freight was lost by the collision, the case would have fallen within the principle to which I have last adverted. I therefore pronounce against the objection."

Sir J. Hannen follows the rule in *The Clarence*.

In the Court of Appeal Lord Esher, M.R., dissented from the majority of the Court (*Lindley v. Bowen*, L.J.J.), on the ground that damages in respect of the loss of the agreement for the future hiring of the ship were too remote. The test he applied³ was: "The damage, then, must be an *actual* damage proved to have occurred in the particular case. It must be the *reasonable, natural, consequential result* of the act complained of;" and the conditions of the test he held were not complied with. Bowen, L.J., in delivering the judgment of the majority of the Court, mainly affirming the judgment of Sir J. Hannen, points out that the English law adopts the principle of *restitutio in integrum* in the estimation of damages, subject to the restriction that they must be such damages as flow "directly and in the usual course of things from the wrongful act," and that in the case of a breach of contract the law includes "such damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable

Affirmed in the Court of Appeal.

¹ 13 P. D. 61, 191, and 14 App. Cas. 519.

² 3 Wm. Rob. 283.

³ 13 P. Div. 191, at 198.

result of its breach." He then goes on:¹ "There is no difference in principle between such a loss (*i.e.*, the loss of a ship), and the loss which the owner of a serviceable threshing machine suffers from an injury which incapacitates the machine, or the loss which a workman suffers who is prevented from earning money by the wrongful detention of plant which cannot at once be replaced. A ship is a thing by the use of which money may be ordinarily earned, and the only question in case of a collision seems to me to be, what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her."

And in the
House of Lords.

The view of Lindley and Bowen, L.JJ., was affirmed in the House of Lords, Lord Fitzgerald adopting entirely the joint judgment. Lord Herschell defined the question before the House as being: "Whether if this were an action brought in the Courts of Common Law and tried by a jury, the judge ought to have directed the jury that these damages could not be recovered on the ground that they were too remote." His solution is in the following words: "I think that damages which flow directly and naturally, or in the ordinary course of things from the wrongful act, cannot be regarded as too remote. The loss of the use of a vessel, and of the earnings which would ordinarily be derived from its use during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision. But further than this, I agree with the Court below that the damage is not necessarily limited to the money which could have been earned during the time the vessel was actually under repair. It does not appear to me to be out of the ordinary course of things that a steamship whilst prosecuting her voyage should have secured employment for another adventure. And if at the time of a collision the damaged vessel had obtained such an engagement for an ordinary maritime adventure, the loss of the fair and ordinary earnings of such a vessel on such an adventure appear to me to be the direct and natural consequence of the collision." The *Argentino*, though directly concerned only with Admiralty law, is also an authority as to the common law rule, since it was undisputed that the rule of the common law and the rule followed in the Court of Admiralty are identical.²

¹ At 200. Cp. *The Atlas*, 93 U. S. (3 Otto) 302.

² See per Lord Esher, M.R., 13 P. Div. 191, at 195; *The City of Peking*, 15 App. Cas.

The primary measure of damages then, whether in contract or tort in Admiralty or at common law, is the amount of the party's loss; and this loss may be analyzed into two components—actual outlay and anticipated profits. Failure to prove loss of profits will not, it is obvious, prevent recovery for loss of outlay in those cases where profits are sought to be recovered but not proved. In contract the common measure of damages for loss of profits is the difference between the cost of doing the work and what the contractor was to receive for doing it.¹ When a party to a contract who is injured by the stoppage of work under it elects to rescind, he cannot recover any damages for the breach either for outlay or loss of profits. He recovers the value of his services actually performed, as upon a *quantum meruit*.²

In tort the principle has been laid down "that if a profit would arise from a chattel, and it is left with a tradesman for repair, and detained by him beyond the stipulated time, the measure of damages is *prima facie* the sum which would have been earned in the ordinary course of employment of the chattel in the time."³

IV. GAMES.

The law as to injuries, received in playing games must be noticed. In the *lex Aquilia* there are several passages referring

438; The City of Lincoln, 15 P. Div. 15. The rule of the Roman Law is instructive: *Nec solum corpus in actione hujus legis aestimatur; sed sane si servo occiso plus dominus capiat damni quam pretium servi sit, id quoque aestimatur; velut si servus meus ab aliquo heres institutus, ante quam jussu meo hereditatem cerneret, occisus fuerit; non enim tantum ipsius pretium aestimatur, sed et hereditatis amissae quantitas. Item si ex gemellis vel ex comœdis vel ex symphoniâcis unus occisus fuerit, non solum occisi fit aestimatio, sed eo amplius quoque computatur quod ceteri qui supersunt depretiati sunt. Idem juris est etiam si ex pari mularum unam vel etiam ex quadrigis equorum unum occiderit.*—Gaius, III. § 212. I do not doubt but that the law of England is the same, though I know of no case in point.

In *American Braided Wire Company v. Thompson*, 44 Ch. Div. 274 at 280, the Attorney-General, *arguendo*, said: "There are two leading principles as to damages for tort—(1) that the loss for which they are given must be the direct consequence of the wrongful act; and (2) that if the loss can be minimised by the act of the plaintiff, he is bound to do it." And see per Cotton, L.J., at 288.

¹ *United States v. Behan*, 110 U.S. (3 Davis) 338; *Fletcher v. Tayleur*, 17 C. B. 21; *Smeed v. Foord*, 1 E. & E. 602. As to the law when interest is recoverable, *London, Chatham, and Dover Railway Company v. South-Eastern Railway Company*, (1893) A. C. 429, and especially per Lindley, L.J. (1892), 1 Ch. 120, at 142; *Calton v. Bragg*, 15 East, 223. For the law in the United States, *Washington, &c., Railroad Company v. Harmon*, 147 U. S. (40 Davis) 571, at 589; *New York, &c., Railroad Company v. Estill*, 147 U.S. (40 Davis) 591, at 620. For *mora debitoris* in the Roman law, see Moyle, Just. Inst., note to Bk. III. 19, 26.

² *Planché v. Colburn*, 5 C. & P. 58, 8 Bing. 14; *Goodman v. Pocock*, 15 Q. B. 576; *Inchbald v. Western Neilgherry Coffee Company*, 17 C. B. N. S. 733. See 2 Sm. L.C. (9th ed.) 43.

³ Per Lord Cairns, C., *Ex parte Cambrian Steam Packet Company*, L. R. 4 Ch. 112, at 117. As to damages recoverable in the case of personal injuries, see *post*, chapter on Lord Campbell's Act.

to this. The broad rule discriminates *ingenui* from *servi*, games *gloriæ causa et virtutis* from games of sport merely, like that of ball. *Si quis in colluctatione, vel in pancratio, vel pugiles dum inter se exercentur, alius alium occiderit, si quidem in publico certamine, cessat Aquilia ; quia gloriæ causa et virtutis, non injuriæ gratia videtur damnum datum. Hoc autem in servo non procedit ; quoniam ingenui solent certare ; in filio familias vulnerato procedit. Plane, si cedentem vulneraverit, erit Aquiliæ locus ; aut si non in certamine servum occidit, nisi si domino committente hoc factum sit, tunc enim Aquilia cessat.*¹ The *lex Aquilia* does not apply to public pugilistic combats, or to wrestling matches, in which a freeman is wounded. But if a slave is wounded while engaged in such sports the exception does not operate, since only freemen are accustomed to contend in them. Games, like the game of ball, are different. Here all may play, and injury received in consequence of participation brings no liability with it. *Cum pila complures luderent, quidam ex his servulum, cum pilam percipere conaretur, impulit, servus cecedit et crus fregit ; quærebatur, an dominus servuli lege Aquilia cum eo, cujus impulsu ceciderat, agere potest ? Respondi non posse ; cum casu magis, quam culpa, videretur factum.*² This difference is to be explained by the consideration that the game of ball was a mere game, and not *gloriæ causa et virtutis*. The underlying principle is, that injuries received while engaged in sports or exercises occasion no liability where they are accidental and sustained in the course of the exercise or sport. If, however, the games are of a kind that the law considers not befitting a slave to take part in, those who play at these games with slaves and injure them are liable for the injury. If the games are not of this sort, a slave is in the same position as a freeman. In any case, the protection only avails during the progress of the game, and in regard to injuries that are natural consequences of it.

With the passages already set out must be taken a third—*Cum stramenta ardentia transilirent duo, concurrerunt, amboque ceciderunt et alter flamma consumptus est ; nihil eo nomine potest agi, si non intelligitur, uter ab utro eversus sit.*³ In this case—arising out of the practice at Rome at the feast of the Palilia⁴ of jumping over heaps of burning straw and hay—there is, in the one case, either absence of evidence of how the event came about, or else contributory negligence ; in the other, the collision is not

¹ D. 9, 2, 7, § 4.

² D. 9, 2, 52, § 4.

³ D. 9, 2, 45, § 3.

⁴ Or more accurately Parilia, a festival of the *dies natalitius* of Rome in honour of Pales, when sheep were more effectually purified by being compelled to run through the fire, and at which the shepherds did the same. Smith, Dictionary of Greek and Roman Antiquities, *sub nom.*

a natural consequence of taking part in the game, and, therefore, he who does the injury is liable in respect of it. But exercises, even those *gloriæ causa et virtutis*, must only be practised in the proper place. *Sed si per lusum jaculantibus servus fuerit occisus, Aquilæ locus est.*¹ On the other hand, if, while they are being lawfully practised, and in the place appropriate for them, injury is caused, there is no liability unless the act causing the liability be an intentional one. *Sed si cum alii in campo jacularentur, servus per eum locum transierit, Aquilia cessat; quia non debuit per campum jaculatorium iter intempestive facere. Qui tamen data opera in eum jaculatus est, utique Aquilia tenebitur;*² and a quotation from Paulus is added—*nam lusus quoque noxius in culpa est.*³ In crossing the *campus jaculatorius*, the slave would be guilty of contributory negligence. This would not excuse a wilful injury.

A curious case is stated by Ulpian:⁴—*Item Mela scribit, si cum* Ulpian's case.
pila quidam luderent, vehementius quis pila percussa in tonsoris manus eam dejecerit et sic servi, quem tonsor radebat, gula sit præcisa adjecto cultello; in quocumque eorum culpa sit, eum lege Aquilia teneri. Proculus in tonsore esse culpam; et sane, si ibi tondebat, ubi ex consuetudine ludebatur, vel ubi transitus frequens erat, est quod ei imputetur; quamvis nec illud male dicatur, si in loco periculoso sellam habenti tonsori se quis commiserit, ipsum de se queri debere.

The law of England does not differ from the civil law.

Law of
England as
to games.

"The law," says Dr Bigelow,⁵ "as to injuries received in games and sports, was, and (as far as the games are lawful⁶) doubt-

¹ D. 9, 2, 9, § 4.

² *Ibid.*

³ D. 9, 2, 10.

⁴ D. 9, 2, 11 pr. The Roman Law drew a distinction between such acts as knocking money out of one's hand (*nummos tibi excussit*) to assist a thief and in a joke. In the latter case the remedy was the *actio Aquilæ utilis*, Gaius, III. § 202.

⁵ L. C. on Torts, 229, citing Pulton, *De Pace Regis*, 7, described as "A work of the beginning of the seventeenth century." There is a copy of this work in the Inner Temple Library, in black letter, bearing date 1609; the title-page of which, after specifying the scope of the work, &c., describes the material of it as "collected out of the Reports of the Common Lawe; of this realme, and of the statutes in force, and out of the painfull works of the reverend judges, Sir Anthonie Fitzharbert, Sir Robert Brooke, Sir William Stanford, Sir James Dyer, Sir Edward Coke, Knights, and other learned writers of our lawes."

⁶ The determination of what are lawful games is of some interest, and may excuse a note. In the proclamation of James I., dated the 24th of May, 1618, and called the Book of Sports, what are lawful games is indicated. This proclamation, says Hallam (*Constitutional History*, 8th ed. vol. ii. chap. viii. 55), was a renewal of that issued in the late reign, that certain feasts or wakes might be kept, and a great variety of pastimes used, on Sundays after Evening Service. It is said to have originated in an order made by Richardson, C.J., at the request of the justices of the peace, for suppressing these feasts. The Privy Council, at the instance of Archbishop Laud, reproved the judge, and directed him to revoke his order. Kennet, 71; Rush, Abr. ii. 166. The proclamation which, says Hallam, was "perfectly legal and according to the spirit of the late Act" (1 Car. I. c. 1) followed on one of the preceding year published in Scotland, and ordained that, "as for our good people's lawful recreation our pleasure likewise is, that after the end of Divine Service, our good people be not disturbed, letted, or discouraged from any lawful recreation, such as dancing—either men or women—archerie

others. He takes the risks incident to the game, and the result of these risks must lie where they fall. I should say that the same principle must govern where romping suddenly arises among people collected together, whether workpeople or others—they take the risk of the romping, and unless there is foul play, there will be no liability for unintended injury by one romper to another. I should even go the length of saying that if two men voluntarily engage in a pugilistic encounter, each must take the black eyes or the bloody noses which the other inflicts¹—or, if two men voluntarily engage in a bout of single stick, each must take the raps he gets from his opponent—and if there be no foul play, there can be no injury giving rise to a claim of damages by the one against the other.” Here there was a romp, which the pursuer took no part in; and when he received injury without having consented to take the risk of it, there arose an actionable wrong.

The distinction between lawful and unlawful games between a fight and a match at single-stick, does not seem regarded. In other respects the decision bears out the English cases.

Very like what, we have seen, was the Roman law is laid down in Comyns's Digest: ² “If a soldier, in muster, discharge his gun and another go cross, whereby he inevitably, and against his will hurts him,” it is not a battery in law. But he must set out the circumstances, and make it appear that he was not in any fault; for it is not enough to shew it was *casualiter et per infortunium et contra voluntatem suam*.³ If one is injured while looking on, the doer of the injury is *prima facie* liable;⁴ and where several persons are engaged in playing at ball in the public highway and a traveller is accidentally hit, the game not being a lawful one in such a place, not only is the person whose negligence caused the accident held liable in trespass, but also all those who are of the party.⁵

¹ But see *Boulter v. Clark*, Bull. N. P. 16, and *Grotton v. Glidden*, 30 Am. St. R. 413, 84 Me. 589.

² Battery (A). See *Moody v. Ward*, 13 Mass. 299.

³ *Weaver v. Ward*, Hob. 134.

⁴ *Underwood v. Hewson*, Bull. N. P. 16.

⁵ *Vosburgh v. Moak*, 55 Mass. 453. In *Ball, Lead. Cas. on Torts*, 423, is the following: “The defence of leave and licence also arises where the parties were engaged in any lawful games. In such a case, indeed, the plea has a somewhat different signification; for obviously it is not any specific blow which is authorized, but a series of acts, some one of which, by misadventure, may result in a blow to one or other of the parties. See *Christopherson v. Bare*, 11 Q. B. 447 (*sic*), where the assault complained of was a blow from a cricket-ball, the parties having been engaged in a game together.” As reported in 11 Q. B. 473, *Christopherson v. Bare* is a special demurrer to a plea of leave and licence to a declaration in trespass, charging that the defendant assaulted plaintiff, imprisoned him, and kept him in prison for the space of one month and twenty-five days. There is no mention of cricket or any other game throughout the report, unless the remark of Coleridge, J., can be so regarded. “If the plea had been only not guilty, the defendant might have shewn that the act was done in the course of sport between the parties and by the plaintiff's leave.” See *Domat*, 2, 8, 4.

CHAPTER IV.

ONUS OF PROOF.

MANY of the most difficult questions of law are to be solved by Introductory. the answer to the question, On whom is the *onus* of proof? since it not unfrequently happens that beyond evidence of the fact of the occurrence of an accident, there is no evidence available to shew how or when or why the injury sued on was caused. In some of the circumstances where this is found, the mere happening of the accident suffices to put the defendant to disproof of his liability. In others, this is not sufficient; but affirmative evidence has to be given charging the plaintiff; while in almost all cases the *onus* at times fluctuates during the progress of the cases, sometimes being *on* one party, sometimes on the other.

Bowen, L.J., in a well-known case,¹ lays down the canons of Bowen, L.J.'s, canons of *onus* of proof. this subject as follows: "Whenever litigation exists, somebody must go on with it; the plaintiff is the first to begin; if he does nothing he fails; if he makes a *prima facie* case, and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden of proof or *onus* of proof, whichever term is used, is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that, as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the *onus* of proof shifts, and at which the tribunal will have to say that, if the case stops there, it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls

¹ *Abrath v. North-Eastern Railway Company*, 11 Q. B. Div. 440, at 456. As to the difference of legal procedure in England and Scotland, which renders actions for malicious prosecution rare in the latter country, see Guthrie Smith, *Law of Damages* (2nd ed.), 293.

over until again there is evidence which once more turns the scale. That being so, the question of *onus* of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests. It is not a rule to enable the jury to decide on the value of conflicting evidence. So soon as a conflict of evidence arises it ceases to be a question of *onus* of proof. There is another point that must be cleared." "As causes are tried the term '*onus* of proof' may be used in more ways than one. Sometimes, when a cause is tried, the jury is left to find generally for either the plaintiff or the defendant, as it is in such a case essential that the judge should tell the jury on whom the burden of making out the case rests, and when and at what period it shifts. Issues, again, may be left to the jury, upon which they are to find generally for the plaintiff or the defendant, and they ought to be told on whom the burden of proof rests; and indeed it is to be observed that very often the burden of proof will be shifted within the scope of a particular issue by presumptions of law, which have to be explained to the jury. But there is another way of conducting a trial at *Nisi Prius*, which is by asking certain definite questions of the jury. If there is a conflict of evidence as to these questions, it is unnecessary, except for the purpose of making plain what the judge is doing, to explain to the jury about *onus* of proof, unless there are presumptions of law, such as, for instance, the presumption of consideration for a bill of exchange, or a presumption of consideration for a deed. And if the jury is asked by the judge a plain question, as, for instance, whether they believe or disbelieve the principal witness called for the plaintiff, it is unnecessary to explain to them about the *onus* of proof, because the only answer which they have to give is 'Yes' or 'No,' or else they cannot tell what to say. If the jury cannot make up their minds upon a question of that kind, it is for the judge to say which party is entitled to the verdict. I do not forget that there are canons which are useful to a judge in commenting upon evidence and rules for determining the weight of conflicting evidence; but they are not the same as *onus* of proof." In considering the subject, however, these matters do not readily admit of separate treatment; for, though the consideration of whose obligation it is to give evidence in order to succeed is necessarily prior to the consideration of what is sufficient evidence to attain success, the solution of both problems, especially where contributory negligence is involved, is very frequently the same.¹

General rule
of law.

The general principle on the question of *onus* is thus framed

¹ *Wakelin v. London and South-Western Railway Company*, 12 App. Cas. 41.

"The party seeking to recover compensation for damage must make out that the party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must shew that the loss is to be attributed to the negligence of the opposite party. If at the end he leaves the case in even scales, and does not satisfy the Court that it was occasioned by the negligence or default of the other party, he cannot succeed,"¹ or, in the terms of the Latin maxim, *Ei incumbit probatio qui dicit ; non qui negat*.

I. RES IPSA LOQUITUR.

We shall, then, in the first place, consider under what circumstances a *prima facie* case of negligence may be raised, calling for an answer on the part of the defendant without any further proof of actual default on his part than is involved in the mere happening of the injurious event. What, in other words, is the legal import of the phrase, *res ipsa loquitur*?²

How a *prima facie* case of negligence can be raised.

The two branches of the inquiry into the meaning of *res ipsa loquitur*—i.e., the consideration of what is not sufficient to raise a presumption of negligence—and the consideration of what is sufficient to raise a presumption of negligence—are treated respectively in the leading cases of *Hammack v. White*³ and *Byrne v. Boadle*.⁴

Hammack v. White is the leading authority for those cases which group themselves under the former branch of the subject. The defendant was riding a horse he had bought at Tattersall's the day before, at a slow pace, in Finsbury Circus, to try it. The horse seemed restless, and the defendant was holding the reins tightly, omitting nothing he could do to avoid an accident. The horse, however, swerved from the roadway on to the pavement, where the deceased was walking, knocked him down, and injured him fatally. An action was brought under Lord Campbell's Act. The Court⁵ thought such a state of facts did not disclose sufficient to render the defendant liable. If it had been shewn that the defendant knew the horse to be vicious and unmanageable that might fix him with liability. *Prima facie*, a man found riding

Hammack v. White.

¹ Per Lord Wensleydale, in *Morgan v. Sim*, 11 Moo. P. C. C. 307, at 311.

² Broom, *Legal Maxims* (6th ed.), 298.

³ (1862) 11 C. B. N. S. 588; *Manzoni v. Douglas*, 6 Q. B. D. 145, which is discussed in *Crawford v. Uppers*, 16 Ont. App. 440; *Shaws v. Croall* (1885), 12 Rettie 1186. Unavoidable accident is not actionable, *Davis v. Saunders*, 2 Chitty (K.B.) 639; *Wakeman v. Robinson*, 1 Bing. 213; *Laurent*, *Principes de Droit Civil*, vol. xx. § 468.

⁴ (1863) 2 H. & C. 722.

⁵ Erle, C.J., Williams, Willes, Keating, JJ.

Erle, C.J.'s,
judgment.

on the footpath was in the wrong, but the witness that proved that shewed that the defendant was there against his will. "I am of opinion," said Erle, C.J., "that a man is not to be charged with want of caution because he buys a horse without having had any previous experience of him. There must be horses without number ridden every day in London of whom the riders know nothing. A variety of circumstances will cause a horse to become restive. The mere fact of restiveness is not even *prima facie* evidence of negligence." The witness who deposed to the fact of the defendant being on the footpath, having also deposed to the fact that he was there unwillingly, and thus displaced the presumption of negligence that his evidence had raised, the only question was as to the effect of restiveness in a horse unaccompanied by any other fact implying negligence; and the decision of the Court in effect was, that the use of horses for riding and driving being recognized, and certain places being proper for them to be used in, while their natural disposition is uncertain, it is not to be supposed that those who ride them should guarantee against the effects of the waywardness of their dispositions.¹

Rule as to *onus*
stated in *Wat-*
son v. Weekes.

The rule as to *onus* in this class of cases is given by Smith, J., in *Watson v. Weekes*,² where, proof having been given that the defendant's horse, harnessed to a cart, ran away unattended along a highway where the plaintiff lawfully was, and injured the plaintiff, the learned judge refused to nonsuit; for the facts "were more consistent with the absence of ordinary care in the superintending the horse than with such care having been used." The same view is taken by an eminent Canadian judge:³ "I think," he says, "the reasonable view of the law and of the ordinary transactions of human life is that, if a man's horses, galloping through a street, run on and injure a passenger on the side walk, a case of *prima facie* wrong is shewn. It may be fully

Crawford v.
Uppers.

Simson v. Lon-
don General
Omnibus Com-
pany.

explicable, but I think it calls for explanation." *Simson v. London General Omnibus Company*⁴ points the same conclusion. "Proof having been given that the horse in question had misconducted itself in the way charged, the burthen of shewing that he was

¹ The *rationale* of the law is investigated in *Brown v. Collins*, 53 N. H. 442, 16 Am. R. 372. The conclusion is that the plaintiff must come prepared to shew either that the intention was unlawful or that the defendant was in fault; for if the injury was unavoidable and the defendant free from blame he will not be liable. See *Shaws v. Croall* (1885), 12 Kettie, 1186, where a horse started from a cab-rank while the driver was putting away a bag of oats. Held no *culpa*. This case may be referred to for the construction of a municipal bye-law that the driver should either sit on the box or stand by the horse's head.

² Not reported, but referred to by the same learned judge in *Tolhausen v. Davies*, 57 L. J. Q. B. 392, at 394.

³ Hagarty, C.J., in *Crawford v. Uppers*, 16 Ont. App. 440, at 444.

⁴ L. R. 8 C. P. 390, per Bovill, C.J., at 393. Cp. *Templeman v. Haydon*, 12 C. B. 507.

not habitually a kicker, or something to account for his having kicked on this particular occasion, lay on the defendants. The mere fact of his having kicked out was, I should say, *prima facie* evidence for the jury.

In *Byrne v. Boadle*,¹ a barrel of flour fell from a warehouse over a shop which the defendant occupied, knocked down the plaintiff, who was walking along the public highway, and injured him. It was contended that these facts did not disclose any evidence of negligence, as the doctrine of presumptive negligence only applied in cases like that of two trains upon the same lines, both being the property and under the management of the same company,² and the law will not presume a man guilty of a wrong. The Court³ held that "it is the duty of persons who keep barrels in a warehouse to take care that they do not roll out;" "such a case would, beyond all doubt, afford *prima facie* evidence of negligence."

*Byrne v.
Boadle.*

The distinction between this case and *Hammack v. White* seems to be that here the cause of the injury was inanimate, there animate. A man who has barrels on his premises is bound to put them in such a position that they will not fall out on the highway; if they do, as they have no powers of motion in themselves, the very fact of movement argues negligence. A man who has a horse is also bound to take care that he does not do damage; but since the horse has a power of motion of his own which it is not necessary for the owner in all cases to provide against his exerting, an accident caused by the exercise of this power does not necessarily argue want of care in the owner; for the motion of the horse may arise from his own unforeseen impulse, and then the owner is not liable; thus, while in the case of the barrel it is enough to shew that it moved from its position and caused injury; in the case of the horse mere movement unexplained will not warrant the same conclusion.⁴

*Cases dis-
tinguished.*

¹ (1863) 2 H. & C. 722; *White v. France*, 2 C. P. D. 308; *Lyons v. Rosenthal* 11 Hun. (N.Y.) 46.

² *Skinner v. London, Brighton, and South Coast Railway Company*, 5 Ex. 787; *Carpue v. London and Brighton Railway Company*, 5 Q. B. 747.

³ Pollock, C.B., Bramwell, Channell, and Pigott, BB.

⁴ In *Great Western Railway Company of Canada v. Braid*; *Great Western Railway Company v. Fawcett*, 1 Moo. P. C. C. N. S. 101, Lord Chelmsford giving judgment, at 116, says: "There can be no doubt that where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *prima facie* evidence of its insufficiency, and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it. However, the plaintiffs did not rest their case solely on the fact of the falling in of the embankment, but called witnesses to give their opinion as to the cause of the injury. It was objected" "that their evidence amounted to theory and conjecture, and that the jury ought not to have been permitted to act upon it. To this it may be answered that although the circumstances which occasioned the accidents were facts to be proved, yet the causes which produced this state of circumstances were necessarily matters of opinion and judgment." The statement of Lord Chelmsford as to what will amount to *prima facie*

Scott v.
London and
St. Katharine
Docks
Company.

Principle as
formulated by
Erle, C.J.

Summary.

A distinction was sought to be drawn in the next case, that of Scott v. London and St. Katharine Docks Company,¹ between the law applicable to the facts as proved there and those found in Byrne v. Boadle, on the ground that the place in which the accident occurred was not a public highway, but a dock, the property of the company, where the public had no right to walk. The plaintiff was an officer of Customs, and, being ordered on duty from one part of the docks to another, on his way he was knocked down by six bags of sugar falling upon him. The Court was agreed as to the principle of law to be applied to the case, though there was a difference of opinion as to its application to the facts.² The principle was thus formulated by Erle, C.J.: "There must be reasonable evidence of negligence. But when the thing is shewn to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."³ This principle appears to cover the two cases of Hammack v. White⁴ and Byrne v. Boadle.⁵

There must be *reasonable evidence* of negligence; and the mere occurrence of an injury is sufficient to raise a *prima facie* case: (a) when the injurious agency is under the management of the defendant; (b) when the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care.⁶ Over inanimate things this duty of care is absolute.

evidence of improper construction of a railway has been greatly controverted. For example, in Czech v. General Steam Navigation Company, L. R. 3 C. P. 14, on its being urged in argument, Willes, J., said: "That case (*i.e.* Fawcett's case) has been much remarked on. The late Chief Justice of this Court (Erle, C.J.) protested against the *onus* of proof in such a case being thrown on the railway company;" and in Bate v. Canadian Pacific Railway Company, 14 Ont. R. 625 at 642, Galt, J., while holding a declaration of law by the Privy Council binding on a Canadian Court, yet intimated concurrence with the opinion expressed in Czech v. General Steam Navigation Company. Gleeson v. Virginia Midland Railroad Company, 140 U.S. (33 Davis) 435.

¹ In the Ex. Ch. (1865), 3 H. & C. 596. A very similar case was Woolley v. Scovell, 3 Man. & Ry. 105, where goods were being thrown from an upper story, and a warning having been given, the plaintiff still thought he had time to get past, but was injured in the attempt. It was held that where A by the wrongful act of B loses his *presence of mind*, and in consequence runs into danger and receives injury from the act of B, B is not protected on the ground that he warned A just before the accident. Fawkes v. Poulson, 8 Times L. R. 725 (C. A.).

² Crompton, Byles, Blackburn, and Keating, JJ., held that plaintiff could recover. Erle, C.J., and Mellor, J., while assenting to the proposition of law, thought the plaintiff had not brought himself within it.

³ This rule was the ground of the decision in Burke v. Manchester, Sheffield, and Lincolnshire Railway Company, 22 L. T. (N. S.) 442, where plaintiff was injured by a jolt occasioned by the train in which he was passenger going against two stationary buffers in such a way that plaintiff was thrown forward and injured. Evidence was given that the train ought to have been brought up to the buffers without a jolt. It was held that such being the case the mere fact of the accident happening was evidence to go to the jury.

⁴ 11 C. B. N. S. 588.

⁵ H. & C. 722.

⁶ Tuttle v. Chicago Railroad Company, 48 Iowa 236.

Over animate it only goes to guard against injury from their customary habits.

The difficulty in drawing the line in these cases was further exemplified in *Briggs v. Oliver*.¹ A packing-case, belonging to the defendant, was put against the wall of his premises, and his servant was watching it. This packing-case fell on the plaintiff, and injured him, from its own weight, and from having been insecurely propped. The Court were divided in opinion, Pigott and Bramwell, BB., holding these facts constituted evidence of the defendant's negligence, since "Packing-cases carefully placed in a proper position do not naturally tumble down of their own accord; and we have no right to assume that the fall of this packing-case was caused by the act of some one who was not the defendant's servant." Martin, B., dissented, on the ground that "the fallacy which appears to me to underlie these cases is that the plaintiff is to be excused from proving negligence, because the person who really knows whether there is negligence or not, is the defendant's servant. Here the defendant might have called him; it is not to be assumed that he would have committed perjury, nor is it for the defendant to disprove negligence." Briggs v. Oliver.
Dissent of Martin, B.

The dissent of Martin, B., appears due to a misconception of the meaning of Erle, C.J.,'s *dictum* in *Cotton v. Wood*,² which he quotes, that where the evidence is equally consistent with the existence or the non-existence of negligence, it is not competent to the judge to leave the question to the jury. This is only so if the inferences are *equally consistent* with the facts proved. The Court must assume that every inference of fact that a jury might legitimately draw has been drawn, and must add such inferences to the other facts of the case. Where there are two inferences equally consistent with the facts proved, one of them cannot reasonably be drawn to the prejudice of the other. The plaintiff, therefore, fails. Where though either of two inferences might be drawn, one involving negligence is more reasonable or likely than the other, then the case cannot be taken away from the jury.³ It Discussed.

¹ (1866) 4 H. & C. 403; see *Higgs v. Maynard*, 12 Jur. N. S. 705, where a ladder falling through a window was held not evidence of negligence, as "not necessarily an event occurring in the course of the defendant's business" (?). Another ground for the decision was that "the ladder was not shewn to have been under the management of the defendant or his servants." See, too, *Pearson v. Cox*, 2 C. P. D. 369.

² 8 C. B. N. S. 568. Cp. *Ruddy v. London and South-Western Railway Company*, 8 Times L. R. 658 (C.A.); and *Bryant v. North Metropolitan Tramways Company*, 6 Times L. R. 396. Driving over a person in the street in broad daylight was held *prima facie* evidence of negligence in *Forwood v. The City of Toronto*, 22 Ont. R. 351, at 357. Cp. per Channell, B., in *Bridges v. North London Railway Company*, L. R. 6 Q. B. 377 at 391.

³ *Flannery v. Waterford and Limerick Railway Company*, Ir. R. 11 C. L. 30; *Smith v. First National Bank*, 99 Mass. 605; *Searles v. Manhattan Railroad Company*, 101 N. Y. 661. Lord Denman, C.J., in *Muddle v. Stride*, 9 C. & P. 380, at 382, directed a jury on this point as follows: "If on the whole, in your opinion, it is left in doubt what

is not sufficient to exonerate a defendant merely to point out that the facts proved are susceptible of another conclusion than that of negligence; it must also be shewn that, of the two inferences that can be drawn, there must be a probability of the inference that acquits him either equal to or greater than that which points to negligence. Martin, B., appears to have adopted the view that it is sufficient, if it is consistent with the evidence, that there was no negligence. This, it is submitted, is a wrong view of the law, and would narrow responsibility very unduly; besides being inconsistent with the cases.

Willes, J.'s,
statement of
the law in
*Smith v. Great
Eastern
Railway
Company*.

The remarks of Willes, J., in giving judgment, in *Smith v. Great Eastern Railway Company*,¹ are much in point. "It is not enough," he says, "to shew that damage may have occurred through the negligence of the defendants' servants, even coupled with the suggestion that no sufficient explanation was given of the dog's conduct. The plaintiff must shew something which the defendants might have done, and which they omitted to do, before they can be held responsible for the misfortune which has happened." The same learned judge, in *Czech v. General Steam Navigation Company*,² happily illustrates the way in which the presumption of negligence may be raised or not raised by a set of facts, differing only in one particular. "If a shipment of sugar," says he, "took place under a bill of lading, such as the present one, and it was proved that the sugar was sound when put on board, and had become converted into syrup before the end of the voyage, if that was put as an abstract case, I think the shipowner would not be liable,³ because there may have been storms which occasioned the injury, without any want of care on the part of the captain or crew; the injury alone, therefore, would be no evidence of negligence on their part. But if it were proved that the sugar was damaged by fresh water, then there would be a strong probability that the hatches had been negligently left open, and the rain had so come in and done the injury, and, though it would be possible that some one had wilfully poured fresh water down into the hold, this would be so improbable that a jury would be justified in finding that the

In *Czech v.
General Steam
Navigation
Company*.

the cause of the damage was, then the defendants will be entitled to your verdict, because you are to see clearly that they were guilty of negligence before you can find your verdict against them. If it turns out in the consideration of the case that the injury may as well be attributable to the one cause as the other, then, also, the defendants will not be liable for negligence." Cp. *Midland Railway Company v. Bromley*, 17 C. B. 372, and *Kent v. Midland Railway Company*, L. R. 10 Q. B. 1, where the declarations were in contract.

¹ (1866) L. R. 2 C. P. 4, at 10.

² L. R. 3 C. P. 14, at 19; followed in the *Glendarroch*, 10 Times L. R. 269 (C. A.).

³ *I.e.*, under a bill of lading which contained an exception from liability for "breakage, leakage, or damage."

injury had been occasioned by negligence in the management of the ship."

Welfare *v.* London and Brighton Railway Company¹ is an extreme instance of an accident which was held not to constitute *prima facie* evidence of liability. The plaintiff went to the defendants' station to make inquiries about the departure of their trains, and was told by a porter to look at a time-table hanging up under a portico in the station. While there a plank and a roll of zinc fell through a hole in the roof and injured him. The Court² were unanimous that he could not recover, both on the ground that the plaintiff had not shewn that the accident had happened through the defendants' servant's negligence, and also on the broad principle that the mere occurrence of the accident did not warrant the inference of negligence. Blackburn, J., said: "In this case no duty is cast on the railway company to insure that no plank shall fall. Their duty is to take reasonable care to keep their premises in such a state as that those whom they invite there shall not be unduly exposed to danger. No doubt the case might occur where, knowing the state of the premises, the company could not send a man on the roof to repair it without necessarily incurring great danger of the roof falling down, and, if the premises are out of repair to this extent, it would be a breach of duty to send a man upon the roof during the hours when persons would be frequenting the premises. But then, in order to make out such a case, something more must be shewn than the mere fact that the accident occurred. In this case there was a total absence of evidence to shew that the premises were really dangerous so as to make the company responsible."³

Welfare *v.*
London and
Brighton
Railway
Company.

Judgment.

In examining this decision we note that, though the first requisite of Erle, C.J.,'s rule in *Scott v. London and St. Katharine Docks* is met, as for the purposes of the decision, the injurious agency is assumed to be under the management of the defendants' Examined.

¹ (1869) L. R. 4 Q. B. 693; *Curran v. Warren Chemical Company*, 36 N. Y. 153, is also an authority that the mere fact of injury occurring on a person's premises raises no presumption of wrong against him. It is otherwise if the injured person is on the highway and injured by something falling from premises: *Clare v. National City Bank*, 31 N. Y. Sup. Ct. (1 Sweeny) 539. In *Huff v. Austin*, 15 Am. St. R. 613, an employé of the vendor of a saw-mill, while assisting in setting up and getting the mill in order, was injured by the explosion of the steam-boiler in the mill; it was held that the mere happening of the accident did not raise a *prima facie* presumption of negligence in the management of his business.

² Cockburn, C.J., Mellor, Lush, Blackburn, JJ.

³ At 699. If the person receiving damage visits the premises with a knowledge of their condition, the fact of his receiving damage while there is not sufficient evidence of want of reasonable care to justify leaving the case to the jury: *Manchester, Sheffield, and Lincolnshire Railway Company v. Woodcock*, 25 L. T. (N. S.) 335. The fact of water flowing from a pipe in upstairs premises and damaging the goods of the occupier of the lower portion of the house, actual negligence being negatived, does not imply a duty on the tenant of the upstairs premises to keep in the water at his peril: *Ross v. Fedden*, L. R. 7 Q. B. 661; see, too, *Stevens v. Woodward*, 6 Q. B. D. 318.

servants, the accident was not such as, in the ordinary course of things, would be likely to happen. "When a person desires to have the roof of a building repaired, he employs some one, not only to repair the roof, but to see to its condition, and to see how far it will support him or his workmen in doing the necessary work." And therefore, in the absence of anything else, as, for instance, the fact that the man was unacquainted with his business, or that the roof was rotten, the accident could not be expected to happen in the ordinary course of things. Lastly, there was nothing in the evidence to shew that the company had, or could have, any knowledge of its insecurity. The presence of the workmen was an indication that they were attending to the condition of the roof, and it was not to be inferred from their attention to its condition that they were guilty of negligence in respect of it. There was, indeed, a duty to use reasonable and ordinary care, but no duty absolutely to prevent the falling of anything from the roof. Mere evidence of something falling did not satisfy the conditions necessary to raise a *prima facie* case. There was needed something to suggest the want of reasonable and ordinary care. The Court's decision amounts to the assertion that the occurrence of an unusual accident on a defendant's own premises, without more, is not sufficient to raise this.¹

Moffatt v.
Bateman.

The Privy Council next had the question of what constitutes *prima facie* evidence of negligence in the case of *Moffatt v. Bateman*,² on appeal from the Supreme Court of Victoria. The plaintiff, a decorator and gardener in the service of the defendant, was driven by the defendant in his buggy some distance to paper some rooms for him. In the course of driving, the horses and the front wheels of the carriage separated from the hinder wheels, possibly from coming in contact with the branch of a tree laid across the road; and plaintiff was injured. The majority of the Supreme Court of Victoria was of opinion the plaintiff could recover on the authority of the principle laid down in *Scott v. London and St. Katharine Docks Company*; though indeed, the bearing of that case on the present seems at first sight, at any rate, not a little remote.

¹ See per Bramwell, B., in *Lay v. Midland Railway Company*, 30 L. T. (N. S.) 529, at 531. "What may happen now after this accident it is impossible to say. Whether the defendants ought or ought not henceforth to preclude the possibility of children tumbling themselves through in this way, may be a question; but up to the time when this child tumbled through, in this unusual manner, no one ever heard it suggested that such a thing could or would happen. Now, however, that it has happened it may possibly be the duty of the company to alter this fence. But to say that this occurrence ought to have been foreseen, ought to have been anticipated, that the man who made the fence ought to have foreseen the possible result of so making it, and that if he had not been negligent he would have foreseen it, is really absolute downright nonsense." See same case, 34 L. T. (N. S.) 30.

² (1869) L. R. 3 P. C. 115.

They held that certain facts had been proved from which inferences might legitimately be deduced that there was evidence to justify a verdict either for plaintiff or defendant, according as the jury accepted the version of one or the other. Williams, J., dissented.¹

Lord Chelmsford, in delivering the judgment of the Privy Council,² thus distinguished Scott v. London and St. Katharine Docks Company: "Undoubtedly in that case there was the strongest *prima facie* presumption of negligence, because it is not in the ordinary course of things that loaded bags should fall out of a warehouse on a person below. But this case is very different. There is nothing more usual than for accidents to happen in driving without any want of care or skill on the part of the driver, and, therefore, no *prima facie* presumption of negligence having been raised," "it was necessary for the plaintiff in the case to give affirmative evidence of there being gross negligence on the part of the appellant occasioning the accident." Some expressions in this statement of the distinction between the case that was being adjudicated on and Scott v. London and St. Katharine Docks Company are a little ambiguous. In one sense, at any rate, it is in the ordinary course of things that loaded bags should fall when being packed in a warehouse if those who have the management do not use proper care—i.e., bags hoisted up and down are very liable to fall if care is not used; and it is because there is this likelihood that the duty of care is imposed, and the liability attaches on its neglect. If the accident were not in the ordinary course of things—that is, if the proper business of the defendant could be carried on without the probability of an accident being present to the mind—then it seems from the authorities³ that no liability will arise from the mere happening of the accident; but if the accident occurs in the ordinary course of things—that is, if the proper business of the defendant cannot be carried on without the probability of such an accident being present to the mind unless care is used—those who have the management are bound to use proper care to exonerate them from liability.

Lord Chelmsford distinguishes Scott v. London and St. Katharine Docks Company.

Distinction considered.

It is in the ordinary course of things, in the business of a dock company, that bags should fall while being raised or lowered in warehouses; and that being so the duty of care arises: then, care being taken, it is not in the ordinary course of things that the bags should fall—i.e., with proper care used, the probability of

¹ He cited *Templeman v. Haydon*, 12 C. B. 507, a case apparently decided more on the effect of the County Courts Act than involving any legal principle.

² Lord Chelmsford, Sir James Colvile, Sir Joseph Napier, Lord Justice Giffard.

³ *Welfare v. London, Brighton, and South Coast Railway Company* (1869), L. R. Q. B. 693; *Higgs v. Maynard*, 12 Jur. N. S. 705.

the fall of a bag is reduced almost to nothing. Hence the *prima facie* liability arose.

With regard to the case under consideration, it is in the ordinary course of things—*i.e.*, the probability of an accident cannot be guarded against, and must be present to the mind even supposing proper care used—that the thousand and one incalculable incidents of a journey may produce an accident. And, therefore, without something further, the mere occurrence of an accident, the mere happening of that which, in the nature of things, cannot be provided against, even with care, does not raise a *prima facie* case of negligence. In other words, if the exercise of care obviates danger, then care must be used, and if an accident occurs there is *prima facie* evidence of negligence. If the use of care does not obviate the probability of accident, then the happening of the accident cannot be used to found a liability.

Kearney v.
London,
Brighton, and
South Coast
Railway
Company.

The principle *res ipsa loquitur* was next applied to what was described as “certainly as weak a case as can well be conceived,” in *Kearney v. London, Brighton, and South Coast Railway Company*.¹ As plaintiff was passing under a railway bridge a brick fell from the perpendicular wall on which one of the girders of the bridge rested and injured him. Hannen, J., directed the jury that if they thought the bare circumstance of a brick falling was not evidence of negligence, they would find for the defendant. The jury found for the plaintiff, and the majority of the Court² upheld the verdict, on the ground that the company, who constructed the bridge, were bound to construct it in a proper manner, and to use all reasonable care and diligence in keeping it in such a state of repair that no damage from its defective condition should occur to those who passed under it; and the fact that a brick was loose and fell afforded *prima facie* a presumption that the defendants had not used reasonable care and diligence. Hannen, J., dissented, considering that it lay on the plaintiff to shew that by an inspection anybody might have seen that the brick was about to fall down. The Exchequer Chamber³ unanimously affirmed the judgment of the Queen’s Bench.

Considered.

Any difficulty in the case comes from its superficial similarity to *Welfare v. London, Brighton, and South Coast Railway*.⁴ In argument in the Queen’s Bench the distinction between them was said to be⁵ that in *Welfare’s* case the man who caused the accident “was not shewn to have been guilty of any negligence, or to have

¹ L. R. 5 Q. B. 411, in the Ex. Ch. L. R. 6 Q. B. 759; *Crisp v. Thomas*, 62 L. T. 810; (C.A.) 63 L. T. 756.

² Cockburn, C.J., and Lush, J.

³ Kelly, C.B., Martin, Channell, and Cleasby, BB., Willes, Byles, and Keating, JJ.

⁴ *Ante*, 135.

⁵ Per Cockburn, C.J., at 413.

been in the employ of the defendants." A sounder distinction seems to be that in Welfare's case the accident happening on the company's own premises, in respect of a matter not only in no way connected with the course of their business, but one which the recognized practice entrusts to persons not the defendants' own servants, in the absence of direct negligence, the defendants would not be chargeable. In the present case the defendants, by constructing their bridge over a highway, became liable to keep the bridge and every part of it in such a state of repair that no damage should arise from its defective condition; and damage having arisen from a defective condition, a presumption of negligence was raised that had to be rebutted to avoid liability.

It has been distinctly held in America that the happening of an accident by reason of something falling from a building upon a street and injuring persons lawfully there, is negligence in the absence of explanatory circumstances; and the burden is on the owner to shew the use of ordinary care.¹ Again, where a passenger on the highway was injured by a hot cinder falling from defendants' locomotive, it was held, that since the plaintiff was merely exercising his ordinary rights, the presumption was that the defendant would not have interfered with him if he had exercised due care.² American cases.

The distinction drawn in *Kearney v. London, Brighton, and South Coast Railway Company*³ forms the basis of the judgment of the Court in *Huey v. Gahlenbeck*.⁴ "We are not prepared," it was there said, "to sustain the doctrine that the owner of property is liable for every injury that may occur to another therein or thereon;" and again, "The mere fact that something fell on the plaintiff's head, without more, is not evidence of negligence on the part of the defendant." This decision seems to be sound in holding that the owner of premises is not liable for injury sustained by another though lawfully upon them, in the absence of any evidence of the direct cause of the injury.⁵ Very similar in principle is *Gleeson v. Virginia Midland Railroad Company*,⁶ where the sides of an embankment slipped down from natural causes over the roadway; and it was held that the accident raised a presumption of negligence. The Court, after comparing the case with *Tarry v. Ashton*,⁷ continued;⁸ "If such be the law, as to persons who, for their own purposes, cause projections to" *Huey v. Gahlenbeck.*

¹ *Mullen v. St. John*, 57 N. Y. 567.

² *Lowery v. Manhattan Railroad Company*, 99 N. Y. 158. ³ *Ante*, p. 138.

⁴ 121 Pa. St. 238, 248, 6 Am. St. R. 790, see the note. Cp. *Landreville v. Gouin*,

6 Ont. R. 455—Snow falling from roof on a passenger.

⁵ *Scott v. The London and St. Katharine's Docks Company*, and *Briggs v. Oliver*, are distinguished in the judgment. ⁶ 140 U.S. (33 Davis) 435.

⁷ 1 Q. B. D. 314.

⁸ 140 U. S. (33 Davis) at 442.

overhang the highway not constructed by them, *à fortiori* it must be the law as to those who, for their own purposes of profit, undertake to construct the highway itself, and to keep it serviceable and safe, yet who allow it to be practically overhung from considerations of economy or through negligence." "It is not a question of negligence in failing to remove the obstruction, but of negligence in allowing it to get there."¹

Scotch Cases.

Macaulay v.
Buist.

Expressions upon this question of *onus* in some of the Scotch decisions might lead to uncertainty if considered in isolation from others in which they have been explained. Thus, in *Macaulay v. Buist*,² Lord Fullerton said: "I cannot adopt the principle which was evidently assumed in the able argument on the part of the defenders, viz., that the verdict must be held to be against evidence, unless the pursuer proved the specific defect of the machine or specific neglect of the defenders which occasioned the accident;" referring to which statement Lord Jeffrey said: "I concur in the view of Lord Fullerton that in all cases of this kind the proprietor (the defenders were owners of machinery which went wrong) is entitled to no presumption of innocence. He must prove that it (the occurrence causing the injury sued on) was an accident, which in this case it is impossible to do, as all the machinery has been shattered to pieces." The inference from this apparently is that, given an accident, blame is presumed against the defender till he shews that he is free from the imputation. This, as we have seen, holds good in only a very limited number of the cases. Here, however, the expression is without any limitation.

Walker v.
Olsen.

In *Walker v. Olsen*³ the accident arose from failure in tackling, for which the owner was found liable; "I think," said the Lord Justice-Clerk, "there was an obligation on the shipowners to provide safe and sufficient tackling, and *prima facie* that obligation had not been complied with when this accident occurred, without the tackling being exposed to any unusual strain;" and in the case of *Fraser v. Fraser*⁴ in the same volume, but reported a few pages earlier, similar expressions may be found tending to impugn the rule settled in the English and American cases. A careful consideration of each of the cases just mentioned will, however, make manifest that there is no necessary contrariety to the current of decisions involved in them. For instance, in *Fraser v. Fraser* the sufficient ground of the decision is that there was a duty to provide a fit rope for a dangerous operation, which duty was neglected by reason of the rope not being examined as

¹ 140 U. S. (33 Davis) at 443.

² (1846) 9 Dunlop 245, 247.

³ (1882) 9 Rettie 946.

⁴ 9 Rettie 896. Cp. *Senior v. Ward*, 1 E. & E. 385.

it should have been. In short, there was evidence of negligence.

In *Macfarlane v. Thompson*¹ these earlier decisions were explained by the Lord Justice-Clerk Moncreiff as follows: "It has been sought to interpret these opinions as authority to the effect that you must presume from the fact that an accident has occurred that there was some defect in the machinery" (through which it was occasioned); "I do not think that any such interpretation can be put upon what I said there." What I did say was that, provided that it is proved that some defect in the machinery or plant caused the accident, it is not necessary to shew the precise nature of the defect, and an *onus* is thrown upon the master to shew that the defect was one for which he was not to blame. But that is a totally different thing from saying that you must infer faults or defects in the machinery where there is no evidence to that effect in any of the surrounding circumstances."

Macfarlane v. Thompson.

An accident that may happen from a variety of causes, any of which is equally probable, and some of which may be due to default of the master, while others are due to influences for which he is not responsible, is not to be presumed to fix him with liability; since it lies always on the plaintiff to prove his cause of action. But if an accident happens due to one of half a dozen causes, all of which involve blame to the defendant, he is not exonerated because the matter may be mixed in such confusion that the plaintiff cannot accurately specify which of the possible causes of his injury is the actual one, and this is manifestly good sense.

Comment.

It was probably through not having these considerations present to his mind that Lord Lee was prompted to dissent in *Gavin v. Rogers*;² which case he expressed himself unable to reconcile with *Walker v. Olsen* and *Fraser v. Fraser*. In *Gavin v. Rogers*, however, there was no defect shewn, nor any want of inspection; antecedently to the accident, for all that appeared, the security against accident was ample. The majority of the Court held in these circumstances that the plaintiff had not discharged the *onus* on him by shewing blame on the defendant. But Lord Lee was of opinion that "the defence of latent defect is one which the defender must prove." That is, if the accident happens from some cause which does not import liability it is for the defendant to shew it. In other words, there is an exception to the rule that the plaintiff must prove that he has been injured by the negligence of the defendant; and in the case of an accident where the plaintiff is unable to make a case by shewing negli-

Gavin v. Rogers.

¹ (1883) 12 *Rettie* 232, *Milne v. Townsend*, 19 *Rettie* 830.

² In *Walker v. Olsen*, 9 *Rettie* 946.

³ (1888) 17 *Rettie* 206.

gence, the defendant has to clear up the obscurity by shewing there is none. This is practically the result where the maxim *res ipsa loquitur* is applicable; in the present instance two things are to be shewn by the plaintiff: first, that the accident happened through a discoverable defect; secondly, that there was fault in the defendants not discovering it.¹

*Onus shifted
by conduct.*

The *onus* of proof may be shifted by acts of the one party rendering the discharge of the *onus* normally resting on the other party more difficult. This is shewn by the Scotch case of *Rooney v. Allans*,² where the injury sued on was caused by the breaking of a chain. In ordinary course the pursuer would have been put to shew some circumstance warranting an inference of negligence. But the defender's superintendent flung the broken piece into the Clyde. "This very indiscreet act," said Lord Young, "shifts the *onus* of proving its (the chain's) condition upon the defenders, whose chief official thus excluded the possibility of a scientific examination." The principle involved is the same as that in the well-known case of *Armory v. Delamirie*,³ where the Chief Justice directed the jury, "that unless the defendant did produce the jewel and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages"—*omnia præsumuntur contra spoliatores*.

*Bird v. Great
Northern
Railway
Company.*

In regard to railway companies, it has been contended that the occurrence of a railway accident is, in itself, *prima facie* evidence of negligence; and *Bird v. Great Northern Railway Company*⁴ has been cited as establishing that proposition. The decision in that case, however, is that the mere occurrence of an accident is not sufficient evidence of negligence to entitle the plaintiff to a verdict without anything more. In argument, *Carpue v. London and Brighton Railway Company*⁵ was cited as

¹ Per Mellish, L.J., *Richardson v. Great Eastern Railway Company*, 1 C. P. Div. 342, 346.

² (1883) 10 Rettie 1224, 1227. Cp. *Murphy v. Phillips*, 35 L. T. (N.S.) 477.

³ 1 Sm. L. C. (9th ed.), 385, 396; *Cornman v. Eastern Counties Railway Company*, 4 H. & N. 781; *Great Western Railway Company v. Davis*, 39 L. T. 475.

⁴ 28 L. J. Ex. 3. In *Rigg v. Manchester, Sheffield, and Lincolnshire Railway Company*, 14 W. R. 834, it was held that the mere statement of witnesses of their opinion that a platform was dangerous, was not any evidence for a jury.

⁵ 5 Q. B. 747. As to *Carpue v. London and Brighton Railway Company*, Brett, J., says in *Hanson v. Lancashire and Yorkshire Railway Company*, 20 W. R. 297, 298: "Lord Denman's ruling in that case was a ruling at *Nisi Prius*, not reviewed by the Court, and I find this in reference to it in *Hodges on Railways* (4th ed.), 531: 'Although in one case it was ruled otherwise by Lord Denman, it seems now to be clearly established that in order to render the company liable for negligence, it is necessary to give affirmative proof of negligence on their part; and it is not sufficient merely to prove the occurrence of an accident, and to rely on that as *prima facie* evidence of negligence. In some cases *res ipsa loquitur*, the accident may be of such a nature as that negligence may be presumed from the mere occurrence of it. But when the balance is even, the *onus* is on the party who relies on the negligence of the other to turn the scale.' This is, I think, a correct exposition of the law." See *Ayles v. South-Eastern Railway Company*, L. R. 3 Ex. 146.

establishing the proposition that the occurrence of the injury itself is *prima facie* proof of negligence. On this Pollock, C.B., is reported as saying, "That depends on the nature of the accident ; as, for instance, if it arises from a collision of different trains on the same line, then it may be so. Here it was otherwise ; the accident was of a nature consistent with the absence of negligence."¹ This seems to indicate correctly the principle of differentiation. A presumption of negligence does not arise in each and every case of an accident on a railway. If, for example, the occurrence of an accident was *prima facie* proof of carelessness in somebody, it does not necessarily follow the carelessness is the carelessness of the company. It might be evidence of negligence in the party injured or in some third person. On the other hand, if the injury arose from some defect in the road, vehicle, or other apparatus used by the railway company, or by any other kind of carrier, and over which the carrier has complete control, or in the agencies employed, the presumption of negligence would be raised in the absence of proof to the contrary ; because they have control, and, when any accident happens, an inference is raised thereby that such control has not completely been exercised.²

The judgment of Palles, C.B., in the Irish case of *Flannery v. Waterford and Limerick Railway Company*,³ well deserves study on this point. The plaintiff was injured through some empty waggons, next the engine in the train in which she was travelling, getting off the line. No evidence was given as to the cause of their leaving the rails, but it was stated that they were not likely to get off the line. The question was, whether these circum-

¹ 28 L. J. E. 3. The same judge, in *Dawson v. Manchester Railway Company*, 5 L. T. N. S. 682, held that a carriage running off the line was *prima facie* evidence of negligence. The American rule is laid down as follows : "Whenever it appears that the accident was caused by any deficiency in the road itself, the cars or any portion of the apparatus belonging to the company and used in connection with its business, a presumption of negligence on the part of those whose duty it was to see that everything was in order immediately arises ; it being extremely unlikely that any defect should exist of so hidden a nature that no degree of skill or care could have foreseen or discovered it." *Curtis v. Rochester Railroad Company*, 18 N. Y. 534 at 537 ; *Brehm v. Great Western Railroad Company*, 34 Barb. (N. Y.) 256. See *Burke v. Manchester, &c., Railway Company*, 18 W. R. 694 ; *Latch v. Rumner Railway Company*, 27 L. J. Ex. 155.

² See Story, Bailm. (9th ed.), § 601a, n. 1, where the authorities are fully collected and considered.

³ Ir. R. 11 C. L. 30. As to the duty of a railway company to examine trucks, see *Richardson v. Great Eastern Railway Company*, 1 C. P. Div. 342, reversing L. R. 10 C. P. 486. In *Mullen v. St. John*, 57 N. Y. 567, the fall of a building into the street was held presumptive evidence of neglect of proper care on the part of the owner. In *Lehman v. Brooklyn*, 29 Barb. (N. Y.) 234, a child was found in a well, in a sidewalk, two or three feet from the flagging. The well was provided with a cover, having a lid opening on hinges. Held not presumptive evidence of negligence against defendant, the owner of the well. In *Stokes v. Saltonstall*, 13 Peters (U. S.) 181, in accordance with *Christie v. Griggs*, 2 Camp. 79, it was held in an action against a stage-coach proprietor, that the fact the coach was upset, and the plaintiff injured, raised a presumption of negligence or want of skill in the driver : *Inland and Seaboard Coasting Company v. Tolson*, 139 U. S. (32 Davis) 551.

Palles, C.B.'s,
judgment.

stances constituted evidence fit to be submitted to the jury that the injuries were caused by defendants' negligence. "The obligation of the defendants," said the Chief Justice,¹ "was to use all due and proper care and foresight, and to provide for the safe conveyance of the plaintiff. Everything connected with the conveyance was under their exclusive management." "The case, then, is one in which negligence of any one of three classes would, if sufficiently connected with the injuries, be sufficient to maintain the action; firstly, negligence in the supervision or maintenance of the permanent way at the point where the waggon left the line; secondly, negligence in the supervision or maintenance of the waggon itself; thirdly, negligence in the driving of the engine. Negligence in any one of these three particulars would be an obvious explanation of the waggon leaving the line. On the other hand, the circumstance of the waggon leaving the line is not inconsistent with inevitable accident nor with the malicious act of a third party; but it will not, I apprehend, be contended that the latter assumption, involving as it does a criminal offence, ought to be made in the absence of any evidence pointing in that direction. I take it, therefore, that the problem to be solved involves a choice between at least two states of fact, in one of which the defendants would be irresponsible. . . . I assume, in favour of the defendants, that the alternative of inevitable accident is not only a possible, but a reasonable one." After pointing out that here, although a reasonable inference against the plaintiff might be drawn, yet the inference the other way would also be reasonable, the case is for the jury, the learned judge continued as follows: "(although some of the propositions in decided cases upon this subject are not as clearly expressed as might be desired) I have a strong opinion that to impute to any judge an intention to lay down the opposite doctrine is to misconstrue his language. If I am right in this, the sole question in the case is, whether the jury might have legitimately drawn from the facts proved the inference that the waggon left the rails in consequence of defect in the wheel, defect in the rail, or mismanagement of the engine. No doubt, in determining whether this inference of fact might *reasonably* be drawn, we, although not jurors, must avail ourselves of our knowledge of the ordinary affairs and incidents of life. Without this knowledge we cannot determine, as we are bound to do, whether a particular inference can reasonably be drawn."² Now, applying my own experience of

¹ 17. R. 11 C. L. 30, at 35.

² In *Shepherd v. Midland Railway Company*, 25 L. T. (N. S.) 879, the Court of Exchequer drew the inference of negligence from the presence of ice on a platform, on which

railway travelling, I find it impossible to say that it is in the ordinary and accustomed course of things that a waggon should leave the rails when all reasonable precautions are taken. To state that such an occurrence happens in the usual and normal state of things, without negligence, is to state that the inevitable result of waggons leaving the rails when travelling at a high rate of speed—viz., the destruction of the entire train and the loss of the lives of numbers of the passengers, are ordinary incidents of railway travelling—nay, of railway travelling conducted with due care. I emphatically refuse to be a party to such a proposition. I believe such an occurrence to be exceptional. That it can happen with due care is, according to my experience, no doubt *possible*, but extremely improbable. If I required, which I do not, evidence in support of this view, I find it in the testimony of the defendants' foreman, that empty waggons are not likely to get off the line."

In the United States the law is clearly laid down :¹ "the plaintiff must show negligence in the defendant. This is done *prima facie* by shewing, if the plaintiff be a passenger, that the accident occurred." "Since the decisions in *Stokes v. Saltonstall*, 13 Pet. 181, and *Railroad Company v. Pollard*, 22 Wall. 341, it has been settled law in this Court (the Supreme Court of the United States) that the happening of an injurious accident is in passenger cases *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care), the burden then rests upon the carrier to shew that its whole duty was performed, and that the injury was unavoidable by human foresight."²

Rule in the
United States.

*Daniel v. Metropolitan Railway Company*³ is a decision of the

*Daniel v.
Metropolitan
Railway
Company.*

the plaintiff slipped and was injured. Pigott, B., said : "It is a question of degree. If there had been only a very small piece of ice in a place where the railway servants had no opportunity of seeing it, there may have been no negligence ; but where we have a layer of ice three-quarters of an inch thick, and extending half across the platform, and that, too, at three o'clock in the afternoon, there was plenty of opportunity for them to have seen it and to have removed it." In argument, the case of a piece of orange-peel on the platform was suggested as not suggesting negligence on the part of the company, and the same learned judge said : "It may have been (negligence) if the orange-peel had been allowed to remain a long time upon the platform without being swept up." In *Ayles v. South-Eastern Railway Company*, L. R. 3 Ex. 146, where various companies had running powers over a line of railway, it was presumed that a train that caused an accident belonged to, or was under the control of, the company owning the line.

¹ *Gleeson v. Virginia Midland Railroad Company*, 140 U. S. (33 Davis) 435 at 445.

² At 443. See also *Inland and Seaboard Coasting Company v. Tolson*, 139 U. S. (32 Davis) 551.

³ (1871) L. R. 5 H. L. 45. In *Cliff v. Midland Railway Company*, L. R. 5 Q. B. 258, it was held no evidence of negligence that a railway company had left off keeping a gate-keeper at a level crossing, and had not exercised powers they had obtained to make a new road, and to discontinue the level crossing. In an Irish case, there was an equal division of opinion as to whether the presence of cattle on a line of railway, and evidence that a gate which should have been kept locked had been unlocked on other occasions, and also that the post to which it should have been locked was loose at the

House of Lords, which, as Lord Westbury said,¹ "will greatly tend ultimately to bring the liability of railway companies to a position in which it may be found to be more consistent with law and less with feeling and excitement, than it has hitherto been." Contractors, not under the control of the defendants, were constructing a work for another corporation under an Act of Parliament, and, in the course of construction, were placing heavy iron girders upon the walls running along the line of railway. A girder overbalanced and fell on a passing train and injured a passenger; by whom the defendants were sued. It was contended that, as the company was liable for the wrongful acts or wilful neglect of their servants, so they were liable for the acts and negligence of persons, not in their employ, by which travellers on their line were injured. The Court of Common Pleas maintained the liability of the defendants, but the Exchequer Chamber reversed its decision. The difference between the two was, the Court of Common Pleas assumed an obligation on the railway company, and committed, as Lord Westbury said,² "*a complete petitio principii*"; since the contractors being undoubtedly liable, the question was, whether in law the railway company had a right to rely on their fulfilling the duty on them. The Exchequer Chamber held they had; and the House of Lords unanimously affirmed the judgment.

General
principle
stated by
Willes, J.

Notwithstanding that the decision of the Court of Common Pleas was reversed, on the considerations peculiar to the case, the general principle applicable to test liability where negligence is alleged, as stated by Willes, J., has been often cited and approved. "It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; and I go further and say that the plaintiff should also shew with reasonable certainty what particular precautions should have been taken."³ The decision of the Common Pleas was given upon another point, having reference to the interposition of contractors and the conditions of their working, when employed to

time of the accident, constituted evidence of negligence to leave to the jury: *Patchell v. Irish North-Western Railway Company*, 6 Ir. R. C. L. 117. See the remarks of Cleasby, B., in *Harris v. Midland Railway Company*, 25 W. R. 63, on *onus* of proof of breach of contract, under 17 & 18 Vict. c. 31, § 7. The cases under the Act are collected *post*. ¹ L. R. 5 H. L. 45, at 62. ² L. R. 5 H. L. at 61.

³ "We entirely agree with the law laid down by the Court below": per Blackburn, J., in the Ex. Ch., L. R. 3 C. P. at 593. See *Hayes v. Michigan Central Railroad Company*, 111 U. S. (4 Davis) 228, at 241. "The question is, was it *causa sine qua non*—a cause which, had it not existed, the injury would not have taken place—an occasional cause? And that is a question of fact, unless the causal connection is evidently not proximate."

do work that may be dangerous. The rejection of their reasoning by the House of Lords leaves the more general position stated by Willes, J. unaffected. Lord Westbury said: "If it were necessary to go into it (which I think it is not), it is plain to my understanding that the accident in this case arose from circumstances of which the railway company could not have been aware—circumstances which it belonged entirely to the province of the contractors to observe and regulate—that it arose from the unusual circumstance that a peculiar motive power, namely, that of a small steam engine, had been substituted by the contractors, for the first time, in moving the girders, which did not move them with a sufficiently regular and gradual motion; so that being moved by jerks, a jerk was applied to the girder at a time when the train happened to be passing by. It was, therefore, an undefined and unknown contingency which, even if you put the contract out of the question, it could not have entered into the minds of the railway company to foresee as possible and therefore to guard against."¹

Lord West-
bury's opinion

Not infrequently the circumstances proved are of a neutral complexion, and evidence of opinion is tendered to accentuate them in the sense of liability. An instance of this is found in *Smith v. The Midland Railway Company*,² where, under a special contract limiting liability to cases of negligence, cows safely loaded in a railway company's truck, at the end of the journey were found to be injured. The contract being a special one, the *onus* was on the plaintiff to give evidence of negligence; since the fact of animals sustaining injury while in the custody of a bailee does not raise any presumption against him;³ and this he attempted to do by giving "expert evidence," stating in effect that from the facts he was of opinion the accident happened through negligence. A Divisional Court, however, set aside the verdict based on this evidence, holding that it was not admissible; since the plaintiff did not come within the rule allowing expert evidence; and the facts proved, independently of his opinion, were ambiguous, and equally consistent with injury caused by restiveness of the animals as by negligence of the defendants.

Evidence of
opinion.

*Smith v. The
Midland Rail-
way Company.*

A claim to interpret facts should obviously be very narrowly scrutinised;⁴ and the instances, where what is not evidence of fact may, by interpretation, be turned into evidence to charge a defendant, should be very strictly defined. To justify the admission of expert testimony two elements must co-exist: (1) The subject-

Comment.

¹ L. R. 5 H. L. at 62. There are some very valuable and striking remarks of the Lord Chancellor, too long to quote, to the same effect, at 54, 55. ² 57 L. T. 813.

³ *Cooper v. Barton*, 3 Camp. 5 note to *Dean v. Keate*, 3 Camp. 4.

⁴ *Cp. Rigg v. Manchester, Sheffield, and Lincolnshire Railway Company*, 14 W. R. 834.

matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge. (2) The witness offering expert evidence must have gained his special knowledge by a course of study or previous habit which secures his habitual familiarity with the matter in hand. The nearest analogy is the interpreting of evidence given in a foreign language. The object of expert evidence is not to eke out a case, but to explain the effect of facts of which otherwise no coherent rendering can be given.¹

II. EVIDENCE OF NEGLIGENCE FOR THE JURY.

Province of
judge and jury
respectively.

Ryder v.
Wombwell.

Willes, J.'s,
statement of
the law.

The difficulty of discriminating the functions of judge and jury respectively was the occasion for a long controversy, in the course of which many and conflicting views were propounded. The general rule is laid down in the Exchequer Chamber, in the case of "Ryder v. Wombwell."² The question was whether articles supplied by the plaintiff to the defendant, an infant, were necessities. Willes, J., thus discusses the point: "The first question is, whether there was any evidence to go to the jury that either of the above articles was of that description? Such a question is one of mixed law and fact; in so far as it is a question of fact it must be determined by a jury, subject, no doubt, to the control of the Court, who may set aside the verdict, and submit the question to the decision of another jury; but there is in every case, not merely on those arising on a plea of infancy, a preliminary question which is one of law, namely, whether there is any evidence on which the jury could properly find the question for the party on whom the *onus* of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a non-suit, if the *onus* is on the plaintiff, or direct a verdict for the plaintiff, if the *onus* is on the defendant."³

Two views as
to its applica-
tion.

One view:
question of
common sense
for the judge.

This seems to have been generally accepted as a correct statement of the law. Its application has been a matter of greater difficulty; and two distinct views grew up, according as judges were impressed with the frequently unjust decisions of juries in favour of injured people against wealthy corporations, or with the necessity of protecting the individual, even perhaps at the cost of injustice, against the negligent tendencies of powerful bodies whose wealth and influence often led them to acts of absolute oppression. The former view may be thus stated: "Where the facts are certain, where there is no other material fact to be inferred

¹ Carter v. Boehm, 1 Sm. L. C. (9th ed.), 523, note 539, and the synopsis, in Phipson, Law of Evidence, 255-263.

² L. R. 4 Ex. 32.

³ L. R. 4 Ex. at 38.

from them, either as causing them or as resulting from them, and the question is not one for experts, but for that common sense which is common to all of us in a greater or less degree, the matter is for the judge." The other view is, that where the question of the liability of the defendant "appears to be a matter of ordinary reasoning, which the jury, as ordinary reasoning men of the world, might properly and justly have arrived at, it is for the jury."

The other view: question of common sense for the jury.

After a multitude of decisions, inclining sometimes one way, sometimes the other, according to the composition of the Court to which each individual case was referred,¹ the case of *Bridges v. North London Railway Company*² came before the House of Lords. Deceased was a passenger in the last carriage of a train going from Broad Street to Highbury Station. Before coming to the Highbury Station there is a tunnel for some short distance, down which there is a continuation, though narrower, of the station platform. On the occasion in question the night was dark and misty; the train did not draw up at the platform; and the carriage in which the deceased was, continued in the tunnel after the front part of train had stopped at the platform. The deceased, who was short-sighted, got out on hearing the porter call the name of the station; and the carriage in which he was, being still in the tunnel, and opposite a heap of dry rubbish, that sloped down from the end of the narrower portion of the platform, he fell, broke his leg, and sustained internal injuries from which he died. The servants of the company subsequently called to passengers to keep their seats; yet this was not until another passenger, who was in the next carriage to that in which the deceased was, had got out. Hearing a groan he went into the tunnel, and found the deceased there and injured.

Bridges v. North London Railway Company.

Mr. Justice Blackburn, who presided at the trial of the action brought by the widow, was of opinion that there was no evidence of negligence to leave to a jury; the Queen's Bench sustained his ruling; in the Exchequer Chamber four judges³ were of opinion that the nonsuit was right, and that there was no evidence to go to the jury; three⁴ were of a different opinion. The judges were called in to advise the House of Lords, and they⁵ were

¹ *Siner v. Great Western Railway Company*, L. R. 3 Ex. 150; 4 Ex. 117, is a sample of the one class of decisions. *Foy v. London, Brighton, and South Coast Railway Company*, 18 C. B. N. S. 225, of the other class. "As I understand the observations of the L. C. J. (Cockburn), he would himself have been of opinion, with a certain qualification, that there was evidence of negligence to go to the jury; but he said if a rule was granted, it would be certain, in *that Court*, to be discharged, and therefore it was refused": per Lord Cairns, C., in *Bridges v. North London Railway Company*, L. R. 7 H. L. 213, at 239.

² L. R. 7 H. of L. 213.

³ *Viz.*, Bramwell, Channell, Pigott, and Cleasby, BB.

⁴ Kelly, C.B., Willes and Keating, JJ.

⁵ Pollock, B., Denman J., Brett, J., and Kelly, C.B.,; Martin, B., was also summoned, but had retired from the bench before the decision was given.

unanimous that there was evidence of negligence which ought to have been left to the jury ; and this opinion was sustained by the House. The decision was carefully limited to the facts of the case, the Lord Chancellor (Cairns) saying, "I trust the case may be found useful in future as negating the idea that under circumstances such as I have described, a case is to be withdrawn from the jury and the mind of the jury not to be farther exercised upon it."

North-Eastern
Railway Com-
pany v. Wan-
less.

Between the argument in Bridges's case and the delivery of the judges' opinions upon it to the House of Lords, the case of North-Eastern Railway Company v. Wanless¹ was both heard and determined. There is a statutory duty² where a railway crosses a highway on the level, and where there are gates for the protection of "horses, cattle, carts, or carriages," for the company's servants to keep them closed when any train is approaching. This duty being neglected, a boy got on the line and was injured by a train of coal-trucks. The Lord Chancellor (Cairns), delivering the judgment of the House, held that "the circumstance that the gates at this level crossing at this particular time, amounted to a statement and a notice to the public, that the line at that time was safe for crossing, and that any person who, under those circumstances, went inside the gates with the view of crossing the line, might very well have been supposed by a jury to have been influenced by the circumstance that the gates were open." The evidence of negligence was therefore based on the non-performance of a statutory duty.

Brett, J.A.'s,
view of the
rule laid down
in Bridges's
case.

In Robson v. North-Eastern Railway Company, Brett, J.A.,³ thus states what he conceives to be the effect of the decision in Bridges's case : The judgment of the House of Lords put "an end to a long controversy, not as to the law, but as to the mode of dealing with these cases. Some of the judges seem to have been of opinion that these cases should as much as possible be withdrawn from the jury, and that the Court ought to say what was reasonable for the passenger to do. The House of Lords held, that as the carrying of railway passengers was conduct in the ordinary affairs of life the jury was the proper tribunal to decide."⁴

¹ L. R. 7 H. L. 12.

² Under 8 Vict. c. 20, s. 47. Williams v. Great Western Railway Company, L. R. 9 Ex. 157, with Lord Halsbury, C.'s, comment ; Wakelin v. London and South-Western Railway Company, 12 App. Cas. 41, at 43.

³ 2 Q. B. Div. 85, at 89. Rose v. North-Eastern Railway Company, 2 Ex. Div. 248.

⁴ In the House of Lords, in Metropolitan Railway Company v. Jackson, Lord Blackburn, referring to this rule, said : "I quite agree that this consideration ought never to be lost sight of, but I cannot think it decisive." "The utmost extent to which your Lordships' decision in that (Bridges's) case can be fairly pressed is, that in such cases the judges should be cautious, before they say that the jury could not legitimately draw the inference which in fact they did draw ; and to this I agree" : 3 App. Cas. 193, at 209.

Amphlett, J.A., giving judgment in the Court of Appeal, in the case of Jackson *v.* Metropolitan Railway Company,¹ and supported by Cockburn, C.J.,² took a somewhat extreme view of the province of the jury consequent on the judgment of the House of Lords. He regarded it as settled "that the question whether in cases of this sort negligence can be inferred from a given state of facts, is itself a question of fact for the jury, and not a question of law for the Court or the presiding judge." The controversy that was thus likely to arise as to the precise effect of the decision, in *Bridges v. North London Railway*, was extinguished by the Lord Chancellor (Cairns) in *Metropolitan Railway Company v. Jackson*,³ in the House of Lords, where he authoritatively states the principle on which *Bridges's* case had been decided. "I am bound to say," he says, "that I cannot look at the case of *Bridges* as in any degree establishing the proposition which it appeared to Lord Justice Amphlett to establish, namely, that whether in cases of this sort negligence can be inferred from any given state of facts, is itself a question of fact for the jury, or as establishing the proposition which it appeared to the Lord Chief Justice to establish—namely, that the jurors are the proper judges whether, if once any negligence is proved, the accident which has occurred is to be connected with such negligence as its cause or as materially contributing thereto. Your Lordships in the case of *Bridges* did not lay down, and I am satisfied your Lordships did not mean to lay down, any new rule upon this subject. It is, indeed, impossible to lay down any rule except that which at the outset I referred to, namely, that from any given state of facts the judge must say whether negligence *can* legitimately be inferred, and the jury whether it *ought* to be inferred."

Amphlett, J.A.'s, and Cockburn, C.J.'s, view.

Lord Cairns, C., in *Metropolitan Railway Company v. Jackson*, dissents from the rule as expounded by Amphlett, J.A., and Cockburn, C.J.

Although *Bridges v. North London Railway Company* was discussed, and the rule governing the decision was more explicitly enunciated in *Metropolitan Railway Company v. Jackson*, in the House of Lords, the real question there was whether, in order to warrant the leaving a case to the jury, it was sufficient to prove negligence in the train of events that resulted in the accident, or whether it was necessary to shew that the negligence bore an actual and immediate relation to the injury sustained. The facts were as follows: The respondent took a ticket on the appellant's line. The compartment, into which he got, gradually filled up, till all the seats were occupied. At the next stoppage after the carriage was full, three persons forced themselves in, and had to stand. When the train stopped again, the three

Metropolitan Railway Company *v.* Jackson.

¹ 2 C. P. Div. 125, at 127.

² At 145.

³ 3 App. Cas. 193, at 200.

extra passengers still remained standing in the compartment, the door of which was opened and then shut. Just as the train was starting there was a rush, and the door of the compartment was opened a second time by persons trying to get in. Thereupon the respondent partly rose and held up his hand to prevent any more persons coming in. After the train had moved, a porter pushed away the people and slammed the door to, just as the train was entering the tunnel. At that very moment the respondent, by the motion of the train, fell forward, and, putting his hand upon one of the hinges of the carriage door to save himself, his thumb was caught and injured. The fact of there being negligence in allowing too many people in the carriage was practically admitted.

Lord Cairns's
judgment.

The Lord Chancellor (Cairns) thus treats the case in his judgment in the House of Lords: ¹ "I do not find any evidence from which, in my opinion, negligence could reasonably be inferred. The negligence must in some way connect itself, or be connected by evidence, with the accident. It must be, if I might invent an expression founded upon a phrase in the civil law, *incuria dans locum injuriæ*. In the present case there was no doubt negligence in the company's servants in allowing more passengers than the proper number to get in at the Gower Street Station; and it may also have been negligence if they saw these supernumerary passengers, or if they ought to have seen them, at Portland Road, not to have then removed them; but there is nothing, in my opinion, in this negligence which connects itself with the accident that took place. If, when the train was leaving Portland Road, the overcrowding had any effect on the movements of the respondent; if it had any effect on the particular portion of the carriage where he was sitting, if it made him less a master of his actions when he stood up or when he fell forward, this ought to have been made matter of evidence; but no evidence of the kind was given."

To the two points of negligence mainly relied on in the Divisional Court and the Court of Appeal—first, that there was no attempt made to remove the extra passengers, and, second, that there was an uncontrolled action on the part of a number of persons on the platform,² the answers given in the House of Lords, were: as to the first, that it was in no way connected with the accident; as to the second, that the action of the porter and its effectiveness negatived the fact of any such uncontrollable action as was alleged.

¹ 3 App. Cas. 193, at 198.

² In the Irish Court of Appeal it has been directly decided that the presence of an excited, riotous, or drunken crowd on a platform is not in itself a state of things that a railway company is to be held accountable for: *Cannon v. Midland Great Western Railway of Ireland*, 6 L. R. Ir. 199.

The rule to be extracted from the case seems then to be, that although there may be evidence of negligence in the conduct of the defendants in some part of their relations to the plaintiff, that in itself is not sufficient to entitle the plaintiff to have his case submitted to the jury ; but the evidence of negligence must be connected with the accident by having more or less contributed to produce it.¹

Bridges v. North London Railway Company decides that where there are facts from which negligence can be inferred the jury must have the opportunity of drawing that inference. The *Metropolitan Railway Company v. Jackson* defines the negligence that is to be inferred as negligence, having a causal connection with the accident. The *Dublin, Wicklow, and Wexford Railway Company v. Slattery*²—the third and last of this group of negligence cases, decided by the House of Lords—establishes that where facts, from which negligence can be inferred, are given in evidence, their effect cannot be neutralized by other evidence contradictory of them, and that the whole must be left to the jury to draw what inference they may please ;³ subject, of course, to an application to the Court *in banc* to set aside the verdict as not being “such as reasonable men might find.”⁴

The decision in *Dublin, Wicklow, and Wexford Railway Company v. Slattery* was the occasion of an extraordinary division of judicial opinion. The jury having found for the plaintiff, damages £1205, a motion to set aside that verdict was discharged by three judges in the Irish Court of Common Pleas.⁵

¹ Cp. *Callender v. Carlton Iron Company, Limited*, 9 Times L. R. 646 (C.A.), affirmed in H. L. 10 Times L. R. 366.

² 3 App. Cas. 1155, affirming Ir. R. 10 C. L. 256. For a case where a man, in a position of safety, seeing a train approaching, left his safe place to cross the railway line, and being injured, was held disentitled to recover, see *Wright v. Great Northern Railway Company*, 8 L. R. Ir. 257 ; in this case a point was that members of the jury from their independent knowledge of the place of the accident suggested facts of negligence which might have warranted their verdict.

³ The Pennsylvania case of *Citizens' Passenger Railroad Company v. Foxley*, 107 Pa. St. 537, lays down the same proposition.

⁴ *Metropolitan Railway Company v. Wright*, 11 App. Cas. 152, where, per Lord Halsbury, the rule in *Solomon v. Bitton*, 8 Q. B. Div. 176, should be altered by the substitution of the word “might” for “ought to.” “It is idle,” said Lord Esher, in *Webster v. Friedeberg*, 17 Q. B. Div. 737, “to say that, in determining whether a verdict was against the weight of evidence, you must not take into serious consideration the opinion of the judge who tried the case. No one has ever said that his opinion is conclusive, but it is a matter to be taken into serious consideration.” See also *Commissioners for Railways v. Brown*, 13 App. Cas. 133 ; *Phillips v. Martin*, 15 App. Cas. 194 ; *Brown v. Commissioners for Railways*, 15 App. Cas. 240. The Court of Appeal may in a proper case enter judgment instead of ordering a new trial, *Allcock v. Hall* (1891), 1 Q. B. 444. The first instance of a new trial, with reference to the merits of the case on the evidence, is in the year 1665 : *Style*, 462, 466. New trials in ejectment, where the verdict went for the defendant, were not permitted even then, because the verdict in ejectment was not conclusive : *Argent v. Darrell*, 2 Salk. 648. It was otherwise if the verdict went for the plaintiff.

⁵ *Monahan, C.J., Keogh, Morris, JJ.*

Division of
judicial
opinion.

On appeal, the judges in the Irish Exchequer Chamber were equally divided.¹ In the House of Lords the decision of the Irish Court of Common Pleas was affirmed, by five² of the law Lords to three³ in favour of reversing it.

Facts of the
case.

The material facts were: The husband of the plaintiff, for damage for whose death plaintiff sued, went with a relative to one of the defendants' stations to see him off by train. To get a ticket it was necessary to cross the line. The train was then slowly coming into the station. Deceased safely crossed and got a ticket. The train had in the meantime arrived, and was stationary. Deceased began to recross the line to rejoin his relative, and went at the back of the train. His view of the down line was impeded by the stationary train, and as he got there an express train caught and killed him. It was a rule of the railway company that the express train should always sound a whistle on approaching the station. The driver of the express swore that he whistled twice. Nine other persons, "including every person whose evidence could be supposed to have been material, all of whom seem to be entirely unimpeached and unimpeachable,"⁴ said they heard the whistling. Two persons, on the other hand, said they did not hear a whistle, and one that he did not hear a whistle but would not swear there was no whistling. The negligence alleged was the absence of whistling. The question was, whether on these facts the judge ought to have withdrawn the case from the jury or not; as to this there were two views.

The view of
the majority—
the valuation
of evidence is
for the jury.

The view of the majority, upholding the decision of the Irish Court of Common Pleas was—that whenever evidence has been given from which legal negligence may be inferred, and other evidence is subsequently given inconsistent with the first, the decision as to which is the more credible must always rest with the jury; and the duty of the judge is confined to pointing out to the jury the rules that should guide them in their findings, and the consequences that would respectively attach to them.

The view of
the minority—
the valuation
of evidence is
only for the
jury where, in
the opinion of
the judge, there
could be a
reasonable
difference of
opinion about
it.

The view of the minority was, that when the evidence, assuming it to be true, shews a state of things in which no reasonable person could be expected to say that the negligence of the defendants, without any concurrence of negligence on the plaintiff's part, was established, there is no evidence to be sub-

¹ Whiteside, C.J., Deasy, B., Barry, J., thinking the judgment ought to be reversed; while Palles, C.B., Fitzgerald, and Dowse, BB., were for affirming it.

² The Lord Chancellor (Cairns), and Lords Penzance, O'Hagan, Selborne, and Gordon.

³ Lords Hatherley, Coleridge, and Blackburn.

⁴ Per Lord Cairns, C., at 1164.

mitted to a jury, and the judge should direct the jury to find for the defendants.¹

It was agreed on all hands that whether there was whistling or not was a question that must be submitted to the jury; and that the remedy for a wrongful verdict was to move for a new trial on the ground that the verdict was against the weight of evidence.

The chief difference of opinion in the House of Lords turned on the question, whether the conduct of the deceased had not so clearly proved him the author of his own injury that there was no evidence of the defendants' negligence to go to the jury.

To establish that, if this were so, the matter might be removed from the jury, Lord Blackburn cited the case of *Skelton v. London and North-Western Railway Company*.² There the Court held that the only act of negligence alleged against the Company—that of not fastening the gate—was not negligence—i.e., was not of such a character as to call for an answer from the defendants. The case, therefore, is not one where the defendants' negligence and its effect on the accident were brought into any relation whatever with the act of the plaintiff. It is merely the ordinary case of a plaintiff not giving evidence enough to raise a legal presumption against the defendants; and goes no further than to shew that in a case where no negligence of the defendants was established, the Court commented on the negligence of the plaintiff that brought about the accident.³ Lord Blackburn also cited the opinion of Brett, J., advising the House of Lords, in *Bridges v. North London Railway Company*,⁴ in which, after pointing out that before directing the jury in terms, the judge first determines whether the plaintiff has been injured by the defendant; next, whether the injury was the result of negligence; Brett, J., then goes on to say, the third question the judge should ask himself is—"Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that the plaintiff had not, in a manner contributing to the accident, done

Skelton v. London and North-Western Railway Company.

The actual point decided there.

Brett, J.'s opinion in *Bridges v. North London Railway Company.*

¹ Compare the view taken in the Supreme Court of the United States, *Schofield v. Chicago, Milwaukee, and St. Paul Railroad Company*, 114 U.S. (7 Davis) 615. In *Randall v. Baltimore and Ohio Railroad Company*, 109 U.S. (2 Davis) 478, the rule is laid down, that where the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict if returned must be set aside, the Court may direct a verdict for the defendant.

² L. R. 2 C. P. 631. In this case Willes, J., at 636, cites *Wyatt v. Great Western Railway Company*, 6 B. & S. 709, as an authority that the Court is bound to consider the question of contributory negligence in deciding whether there is any evidence to go to the jury of the defendants' liability. This is, however, disputed by Blackburn, J., 3 App. Cas. at 1211. And a reference to the judgment of Cockburn, C.J., 6 B. & S. at 717, will make it clear that the decision in that case was merely upon 8 & 9 Vict. c 20, s. 47, importing a legislative prohibition.

³ See per Lord Penzance, 3 App. Cas. 1155, at 1178. ⁴ L. R. 7 H. L. at 233.

His direction in accordance with it in *Radley v. London and North-Western Railway Company* overruled by the House of Lords.

Brett, J.'s, view considered.

Rule of law analyzed.

anything, or omitted to do anything, which a person of ordinary skill, under the same circumstances, would not have done or would have done?" Lord Blackburn relied on this passage as shewing that in the opinion of Brett, J., a judge could in such circumstances withdraw the case from the jury. Yet in *Radley v. London and North-Western Railway Company*,¹ Brett, J., having directed the jury in accordance with that view of the law, was held by the House of Lords, Lord Blackburn assenting, to have made a statement of the law "contrary to the doctrine established in the case of *Davies v. Mann*";² and the case was ordered to be sent down for a new trial. If then a case were removed from the jury on evidence of such acts, the Court *in banc* would be constrained to order a new trial, since acts of the character indicated—viz., those shewing want of ordinary skill—would not necessarily import liability. The inquiry in all such cases is, could the *defendant*, by the exercise of ordinary care and diligence, have avoided the mischief; and if he could, the plaintiff's negligence will not excuse him.³

The question, therefore, always implies a balance of considerations. There must first be evidence of negligence on the part of the defendant; then the defendant may shew, either by calling witnesses or out of the plaintiff's own case—not that the plaintiff has been guilty of negligence, for the plaintiff is entitled to say, I may be just as negligent as I please, that does not excuse your injuring me; you—the defendant—must shew that you were ordinarily prudent and careful in what you did, and that with ordinary care and diligence you could not avoid injuring me;—that the negligence of the plaintiff was such as produced the accident, despite the exercise of ordinary care and diligence on the part of the defendant. A negligent plaintiff is not, because he is negligent, to be made the victim of a recklessly negligent act. The proof, then, of certain facts, however condemnatory of the plaintiff, is not sufficient; he is entitled to be negligent:⁴ what changes the *onus* is the finding that the effect of his acts could not be

¹ 1 App. Cas. 754, per Lord Penzance, at 760; *Inland and Seaboard Coasting Company, v. Tolson* 139 U. S. (32 Davis) 551.

² 10 M. & W. 546.

³ *Radley v. London and North-Western Railway Company*, 1 App. Cas. 754, at 759.

⁴ *Bird v. Holbrook*, 4 Bing. 628, "is a decisive authority against the general proposition that misconduct, even wilful and culpable misconduct, must necessarily exclude the plaintiff who is guilty of it from the right to sue": per Lord Denman, C.J., *Lynch v. Nurdin*, 1 Q. B. 29, at 37; but as to the authority of *Bird v. Holbrook* for the main proposition maintained therein, see *Jordin v. Crump*, 8 M. & W. 782; *Degg v. Midland Railway*, 1 H. & N. 773. The proposition that injury sustained while violating a legal duty cannot form the subject of an action, has been maintained in some cases, e.g. in some of the United States of America injury sustained while travelling on a Sunday, which is against the law, has precluded recovery in an action: *Cheshire Railroad Company v. Bucher*, 125 U. S. (18 Davis) 555. The decisions to that effect

avoided by the ordinary care of the defendant. As Lord Blackburn says,¹ "If there is some farther inference of fact which may be drawn from the undisputed facts, it is still for the jurymen to say whether they will draw that inference." A drunken man falls asleep in the middle of the road: the defendant drives over him. The evidence shews that the road is wide and straight, and the driver skilful. The judge on these facts could not nonsuit, on the ground of contributory negligence;² for contributory negligence, which "arises when there has been a breach of duty on the defendants' part, not where *ex hypothesi* there has been none,"³ cannot be established without proof of the proposition, "that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result by the exercise of ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence will not excuse him." As this proposition cannot be established without a comparison of facts, it must be for the jury.⁴ Wakelin v. London and South-Western Railway Company⁵ is not inconsistent with this. There the plaintiff's evidence failed to establish a case against the defendants. At the most, on the whole evidence of the plaintiff, a case equally consistent with the presence or with the absence of negligence was shewn; while the burden was on the plaintiff to shew facts more consistent with negligence than with the other alternative in order to go to the jury. In Slattery's case the *onus* on the plaintiff had been discharged, though in addition evidence—possibly overwhelming—had been given on the

Contributory negligence involves comparison of facts,

and is to be decided by the jury.

seem wrong in principle on the ground "that we should work a confusion of relations, and lend a very doubtful assistance to morality, if we should allow one offender against the law to the injury of another, to set off against the plaintiff that he too is a public offender": *Mohney v. Cook*, 26 Pa. St. 342, at 349; *Philadelphia, Wilmington, and Baltimore Railroad Company v. Philadelphia, &c., Tow-boat Company*, 23 How. (U. S.) 209. The cases under 29 Car. II. c. 7 go only to declaring void contracts made on the Lord's day, and this no further than in the case of executory contracts which the Courts were invoked to execute. *Creppe v. Durden*, 1 Sm. L. C. (9th ed.) 692. See also for the effect of an illegality on a claim, *Redmond v. Smith*, 7 M. & G. 457; and *Wetherell v. Jones*, 3 B. & Ad. 221. The *dictum* of Lord Lyndhurst, C. B., in *Colburn v. Patmore*, 1 C. M. & R. 73 at 83, has obviously reference to a very different set of circumstances. He says: "I know of no case in which a person who has committed an act declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime." "I entertain little doubt that a person who is declared by the law to be guilty of a crime cannot be allowed to recover damages against another who has participated in its commission." The principle here laid down would be effectual in the alleged case of the highwayman who instituted a bill in the Exchequer against his companion to account for his share of the plunder, founded on a supposed dealing as co-partners in rings, watches, &c. See *European Magazine*, 1787, vol. ii. 306, also *Noy, Maxims* (9th ed.), 205, note, and *Law Quarterly Review*, vol. ix. 197. ¹ 3 App. Cas. 1155, at 1201.

² See per Coleridge, J., in *Clayards v. Dethick*, 12 Q. B. 439, at 445.

³ Per Bowen, L.J., *Thomas v. Quartermaine*, 18 Q. B. Div. 685, at 697.

⁴ Per House of Lords, including Lord Blackburn, in *Radley v. London and North-Western Railway Company*, 1 App. Cas. 754, at 759. ⁵ 12 App. Cas. 41.

other side. In Wakelin's case no *prima facie* case for the plaintiff was made out; in Slattery's only a bad one; yet bad though it was, it had to go to the jury, for there was a dispute as to fact.

The difference may be stated thus: where contributory negligence is not alleged, the plaintiff's evidence may shew on the whole that he has not made out his case; one portion of his evidence may colour another portion, and the whole be neutralized; the judge may then nonsuit. Contributory negligence, on the contrary, implies a *prima facie* case established by the plaintiff. To displace a *prima facie* case by shewing contributory negligence implies a preference of one of two differing views. This preference is the prerogative of a jury.

Bearing of
Slattery's case
on the point.

The question of contributory negligence is, however, only incidentally involved.¹ In Slattery's case the inquiry was whether, when evidence is given which by itself raises a presumption of negligence, which afterwards, by reason of other evidence, has its force diminished, it can, under any circumstances, be considered so far obliterated as to warrant the judge in removing the case from the jury.

It was contended by the dissentient judges that, where the contradictory evidence could be regarded as admitted, the effect was to obliterate the evidence that shewed negligence. Now though the *facts* of the manner of crossing and the approach of the train were admitted in Slattery's case, the conclusions drawn from the admitted facts were not admitted. On the one hand, the conclusion suggested was, that Slattery was guilty of negligence, on the other, that he got into his perilous position through the neglect of the engine-driver to whistle and give him proper warning. So that, though the bare facts were admitted, the conclusion from them being consistent with either of two states of facts, one of which the one side adopted, the other the other; and evidence having been given which threw the *onus* of disproof on the defendants, and raised a presumption, though a very slight one, in favour of the plaintiff, the question had to be left to the jury. Where both evidence and conclusions from evidence are admitted, there can be nothing to leave to the jury; but this is a state of things of rare occurrence; since usually where facts are admitted the inferences from them are disputed, where inferences are not disputed then the facts are.

Conclusions
from Slattery's
case.

The conclusions to be drawn from Slattery's case are: It is competent to, and the duty of, the judge to say whether there is evidence to go to the jury on any issue; and he is not precluded from taking the case from the jury when the plaintiff,

¹ 3 App. Cas. 1155.

in proving negligence, proves also other facts of such a character that no reasonable men could find in his favour.¹ But it is not competent for him to say that any one issue is proved more than any other, and to withdraw the case from the jury. Further, where there are either facts or conclusions from facts in dispute the decision of them is for the jury.²

The effect of the decision in *Dublin, Wicklow, and Wexford Railway Company v. Slattery*,³ was canvassed in *Davey v. London and South-Western Railway Company*.⁴ The facts, as stated by Lord Coleridge, C.J., were: the plaintiff "caused the accident by walking straight into a train that he might have seen." On this evidence at the trial the judge nonsuited the plaintiff; a rule was subsequently obtained on the ground that, "if there is evidence of negligence or a breach of duty by the defendants without which the accident would not have happened, there is a case for the jury; and it is well settled that evidence of contributory negligence, however strong, cannot entitle a judge to withdraw the case from the jury." The Divisional Court discharged the rule, and Lord Coleridge, C.J. (one of the dissentient judges in *Slattery's* case), laid down the law in the following terms: "It is for the plaintiff to shew, before he can recover, that there was negligence on the part of the defendant, and that such negligence caused the injury to the plaintiff. In the present case the plaintiff must therefore make out two things: first, that the defendants, through their servants, did or omitted to do something which a reasonably careful person would not have done or omitted to do; and, secondly, that the plaintiff's injury was thereby occasioned. It has certainly been determined in several cases, which have not been overruled so far as I am aware, that if the plaintiff, in attempting to establish his case, not only does not shew any act or omission of the defendants from which the accident arose, but, on the contrary, does shew that he himself caused the damage, then his case fails, because he proves affirmatively that he himself is the author of his own wrong. If, therefore, by the uncontradicted facts, on the truth of which the

Davey v. London and South-Western Railway Company.

Judgment of Lord Coleridge, C.J.

¹ *Wright v. Midland Railway Company*, 51 L. T. 539; *Mitchell v. New York, &c., Railroad Company*, 146 U. S. (39 Davis) 513.

² In the United States the rule is the same; *Washington and Georgetown Railroad Company v. Harmon*, 147 U. S. (40 Davis) 571.

³ 3 App. Cas. 1155. The law in the United States is indistinguishable: *Dunlap v. North-Eastern Railroad Company*, 130 U. S. (23 Davis) 649.

⁴ 11 Q. B. D. 213, at 216, 12 Q. B. Div. 70. *Reading and Columbia Railroad v. Ritchie*, 102 Pa. St. 425. *Cornish v. Accident Insurance Company*, 23 Q. B. D. 453, is a decision on a policy of insurance against accident happening "by exposure of the insured to obvious risk of injury." The insured met his death through attempting to cross the main line of a railway in front of an approaching train. The Court held that injuries occasioned by negligence were not in all cases excepted by such a clause. Bowen, L.J., inclined to construe "obvious" as "evident to the senses."

plaintiff must rest his own case, it is shewn that the damage to the plaintiff was caused by himself, it seems to me that the learned judge was right in nonsuiting the plaintiff, because he failed in sustaining the *onus* which he was bound to sustain, viz., of shewing that the injury resulted from the defendants' acts."

Denman, J.,
concurr;
Manisty, J.,
doubts.
Divisional
Court affirmed
in the Court
of Appeal;
Baggallay,
L.J., dissents.

Denman, J., concurred in this; but Manisty, J., had doubts whether the question of reasonable precautions was not for the jury. On appeal, the decision was sustained by Brett, M.R., and Bowen, L.J., Baggallay, L.J., dissenting.¹ The dissent of Baggallay, L.J., was based upon an illustration used by Lord Cairns in giving judgment in *Dublin, Wicklow, and Wexford Railway Company v. Slattery*:² "If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, I should think that the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death." The Lord Justice was of opinion that the case shewed both negligence on the part of the defendants, and an absence of contributory negligence on the part of the plaintiff. The majority of the Court, however, was of opinion that no negligence of the defendants had been shewn.³

Judgment of
Bowen, L.J.,
with reference
to Lord
Cairns's
illustrations.

Bowen, L.J., thus deals with Lord Cairns's illustration: "The question for the House of Lords was, whether the learned judge at the trial should have nonsuited or not; and that question divided itself into two parts: First, whether there was evidence of negligence in the railway company to go to the jury; secondly, whether, even assuming there was such, that was negligence which could have caused the accident, or whether there was not such clear contributory negligence on the part of the plaintiff as rendered it impossible for a reasonable person to suppose the accident was caused by anybody except the plaintiff himself. Now, the observations of Lord Cairns in that case, it will be observed, arise solely on this second branch. Lord Cairns thought that, on the admitted facts, it could not be said that there were not two views open of the plaintiff's conduct, and the reason he thought so was because the plaintiff was a person who was simply crossing, in the night-time, a station where the trains ought to whistle when they were passing such crossing in the

¹ 12 Q. B. Div. 70, 74.

² 3 App. Cas. 1155, at 1166.

³ Cp. *Greenwood v. Philadelphia, &c., Railroad Company*, 124 Pa. St. 572, 10 Am. St. R. 614, as to what is not merely evidence of negligence but "negligence *per se*" in a traveller.

⁴ 12 Q. B. Div. 70, at 78.

night-time, and on the ground that the facts there did admit of two reasonable views, Lord Cairns thought that the judge ought not to have nonsuited. If the facts here had been exactly as they were in that case, one would have come to the same conclusion in the present case, but it is because I think they do not fall within the facts of that case, but, on the contrary, do not leave open two views which can be reasonably taken of the plaintiff's conduct that I think the judge was right in nonsuiting."

So much, then, was necessary for the decision of the case. Brett, M.R., in giving his judgment, took occasion to reiterate his views as to the burthen of proof in cases where contributory negligence is alleged. He said: "In such an action as this the burthen of proof lies entirely upon the plaintiff. There are two things for him to establish, one is affirmative and the other negative. It is for the plaintiff to shew that the accident which happened to him was caused by a negligent act of the defendants, or of those for whose negligent acts the defendants are liable, and that that accident was produced, as between him and the defendants, solely by the defendants' negligence, in this sense, that he himself was not guilty of any negligence which contributed to the accident; because, even though the defendants were guilty of negligence which contributed to the accident, yet, if the plaintiff also was guilty of negligence which contributed to the accident, so that the accident was the result of the joint negligence of the plaintiff and of the defendants, then the plaintiff cannot recover, it being understood that if the defendants' servants could, by reasonable care, have avoided injuring the plaintiff, although he was negligent, then the negligence of the plaintiff would not contribute to the accident."¹

Brett, M.R., reiterates his views as to burthen of proof in cases where contributory negligence alleged.

¹ 12 Q. B. Div. 70, at 71. See *Brown v. Midland Railway Company*, 1 Times L. R. 406, with note of *Wright v. Midland Railway Company*, where Davey's case is commented on by Brett, M.R. In *Curtin v. The Great Southern and Western Railway Company of Ireland*, 22 L. R. Ir. 219, it is again discussed. See, too, *M'Donnell v. The Great Southern and Western Railway Company*, 24 L. R. Ir. 369. Lord Esher, M.R., subsequently (Mich. Term 1890), on Davey's case being cited, said he hoped he should never hear that case cited again, as he was now of opinion that the judgment of Baggallay, L.J., was right. Bowen, L.J., who was sitting with the Master of the Rolls, did not express concurrence. (*Ex mea relatione*.) Compare *Jones v. Grand Trunk Railroad Company*, 16 Ont. App. 37, and *Follett v. Toronto Street Railroad Company*, 15 Ont. App. 346, the case of walking a horse against a tramcar—very like *Allen v. North Metropolitan Tramway*, 4 Times L. R. 561. In *Pearl v. Grand Trunk Railroad Company*, 10 Ont. App. 191, Davey's case is considered at length. *Ruddy v. London and South-Western Railway Company*, 8 Times L. R. 658, is the case of a boy being run over by a van; *Dallas v. Great Western Railway Company*, 9 Times L. R. 344, a level crossing case, where judgment was entered for plaintiff in C. A.; *Newman v. London and South-Western Railway Company*, 7 Times L. R. 138, a nonsuit in a level crossing case. In *Harrison v. North-Eastern Railway Company*, 29 L. T. (N. S.) 844, there was said to be no duty upon a railway company which allows people to cross their line, but in no definite track, to use care to protect them.

American
Cases.
Continental
Improvement
Company v.
Stead.

Three American cases may here be quoted. In *Continental Improvement Company v. Stead*,¹ the law in the United States was thus laid down. "Travellers upon a common highway which crosses a railroad upon the same level and the railroad company running a train have mutual and reciprocal duties and obligations; and although the train has the right of way, the same degree of care and diligence in avoiding a collision is required from each of them. That right does not, therefore, impose upon such a traveller the whole duty of avoiding a collision, but is accompanied with and conditioned upon the duty of the train to give due and timely warning of its approach. The degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavouring fairly to perform his duty." This was followed by *Railroad Company v. Houston*,² which bears a very close resemblance to the English cases just cited. There the neglect of the engineer to sound a whistle or bell, on nearing a street crossing, was held not to relieve a traveller on the street from the necessity of taking ordinary precautions for his safety. It was laid down that before attempting to cross the rails the traveller is bound to use his senses, to listen and to look, in order to avoid any possible accident from an approaching train. If he omits to use them and walks thoughtlessly on the rails, or if using them he sees the train coming and nevertheless determines to cross the line and in the act is injured, he so far contributes to his injury as to deprive himself of a right to complain. Having elected to undertake the risk he must abide by the consequences of his choice. It may further be concluded, from *Schofield v. Chicago, Milwaukee, and St. Paul Railroad Company*,³ that, in a case of the sort indicated, the judge has power to take the case from the jury, and to direct a verdict for the defendant.

Railroad
Company v.
Houston.

Schofield v.
Chicago, Mil-
waukee, and
St. Paul Rail-
road Company.

Wakelin v.
London and
South-
Western
Railway
Company.
Brett, M.R.,
repeats his
view in the
Court of
Appeal.

In *Wakelin v. London and South-Western Railway Company*,⁴ the husband of the plaintiff was found dead on the defendants' railway, near a public footpath, and nothing was known about how he got there. Brett, M.R., in the Court of Appeal, once more expressed his opinion that: The plaintiff "was not only bound to give evidence of negligence on the part of the defendants which was a cause of the death of the deceased, but was

¹ 95 U.S. (5 Otto) 161. The citation is from the head note; see 164.

² 95 U.S. (5 Otto) 697, at 702.

³ 114 U.S. (7 Davis) 615. The American law is very fully discussed in the later case of *Grand Trunk Railroad Company v. Ives*, 144 U.S. (37 Davis) 408, at 419 *et seq.*

⁴ 12 App. Cas. 41. *Barker v. London and South-Western Railway Company*, 8 Times L. R. 31, where the C. A. case, *Coburn v. Great Northern Railway Company*, is appended in a note. Cp. per Lord Wensleydale, *Morgan v. Sim*. 11 Moo. P. C. C. 307, at 311.

also bound to give *prima facie* evidence that the deceased was not guilty of negligence contributing to the accident; and that by reason of the plaintiff having been unable to give any evidence of the circumstances of the accident, she had failed in giving evidence of that necessary part of her *prima facie* case.”¹ In the House of Lords, however, the correct view was determined to be that the plaintiff was required to give evidence only on the first head, that the accident was caused through the negligent act of the defendants. Lord Watson² pointed out that this view was not inconsistent with *Slattery’s* case. “I am of opinion,” he said, “that the *onus* of proving affirmatively that there was contributory negligence on the part of the person injured, rests, in the first instance, upon the defendants, and that in the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative in order to entitle her to a verdict in her favour. That opinion was expressed by Lord Hatherley and Lord Penzance in the *Dublin, Wicklow, and Wexford Railway Company v. Slattery*.³ I agree with these noble Lords in thinking that, whether the question of such contributory negligence arises on a plea of ‘not guilty,’ or is made the subject of a counter issue, it is substantially a matter of defence. And I do not find that the other noble Lords who took part in the decision of *Slattery’s* case said anything to the contrary. In expressing my own opinion, I have added the words ‘in the first instance,’ because, in the course of the trial the *onus* may be shifted to the plaintiff so as to justify a finding in the defendants’ favour, to which they would not otherwise have been entitled.” Lord Blackburn concurred with Lord Watson.

But is over-ruled in the House of Lords.

Lord Watson’s opinion.

Lord Halsbury, C., said: “It is incumbent upon the plaintiff in this case to establish by proof that her husband’s death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, by which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved, the plaintiff fails, and if in the absence of direct proof, the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition: *Ei qui affirmat non ei qui negat incumbit probatio*.⁴”

Lord Halsbury’s opinion.

¹ 12 App. Cas. 41, at 43. This is settled law in Maine: *State v. Maine Central Railroad Company*, 76 Me. 357.

² 12 App. Cas. 41, at 48.

³ 3 App. Cas. 1155, at 1169, 1180.

⁴ *Ei incumbit probatio, qui dicit; non qui negat*, D. 22, 3, 2. *Semper necessitas probandi incumbit illi qui agit*. Inst. 2, 20, 4. See a remark by Pales, C.B.,

If the simple proposition with which I started is accurate, it is manifest that the plaintiff, who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by—in this sense that it could not have occurred without—her husband's own negligence, as by the negligence of the defendants, does not prove that it was caused by the defendants' negligence. She may indeed establish that the event has occurred through the joint negligence of both, but if that is the state of the evidence the plaintiff fails, because *in pari delicto potior est conditio defendentis*. It is true that the *onus* of proof may shift from time to time as matter of evidence, but still the question must ultimately arise whether the person who is bound to prove the affirmative of the issue—*i.e.*, in this case the negligent act done—has discharged herself of that burden. I am of opinion that the plaintiff does not do this unless she proves that the defendants have caused the injury in the sense which I have explained.”¹ Or, as Lord Esher, M.R., expresses the same rule, “a person on whom the burden of proof lies, may always, in order to discharge himself of that burden, vouch what is proved for him by his opponent.”²

The accepted rule.

It often happens in these cases, that while the plaintiff has been striving to prove negligence, he indicates facts which would shew contributory negligence. In this event, before he can recover, he has not only to shew affirmatively the negligence of the defendant, but some facts to answer the implication of negligence on his part, also arising from his evidence. This proof, however, is non-essential to his case.³ The *onus* on the plaintiff is to shew that the defendant's negligence caused the accident, and where the plaintiff gives evidence of a state of things equally consistent with the wrong being caused by his own negligence or by the negligence of the defendant he has not proved his case.⁴ Save in this connection the plaintiff

in *Hull v. The Great Northern Railway Company of Ireland*, 26 L. R. Ir. 289, at 294, on “the ordinary principles as to *onus* of proof.” Also compare a remark in *Inland and Seaboard Coasting Company v. Tolson*, 139 U.S. (32 Davis) 551, at 557; *Washington, &c., Railroad Company v. Harmon*, 147 U.S. (40 Davis) 571.

¹ 12 App. Cas. 41, at 44.

² *Kimber v. The Press Association* (1893), 1 Q. B. 65, at 71.

³ Cp. as to this *Clyde Navigation Company v. Barclay*, 1 App. Cas. 790, and the remarks of Lord Chelmsford, 792, 793, and of Lord Selborne, at 796. *Avis v. The Great Eastern Railway Company*, 8 Times L. R. 693.

⁴ The rule in the United States is, that where the evidence, given at the trial with all the inferences that the jury could justifiably draw from it is insufficient to support a verdict for the plaintiff—*i.e.*, where such a verdict, if returned, must be set aside, the Court is not bound to submit the case to the jury, but may direct a verdict for the defendant: *Goodlett v. Louisville, &c., Railroad*, 122 U.S. (15 Davis) 391, at 411. “It would be an idle proceeding to submit the evidence to the jury where they could justly find only in one way: *Anderson County Commissioners v. Beal*, 113 U.S. (6 Davis) 227, at 241:” per Field in *North Pennsylvanian Railroad Company v. Commercial Bank of Chicago*, 123 U.S. (16 Davis) 727, at 733. Evidence of careful habits of the person injured is inadmissible: *Chase v. Maine Central Railroad Company*, 77 Me. 62.

has nothing to do with disproof of contributory negligence as the foundation of his case.¹

Delany v. The Dublin United Tramways Company, Limited,² presents some features that may be noticed here. The plaintiff, being drunk, got on the defendants' tramcar while in motion. The conductor pushed him; he fell, and received serious injuries, in respect of which he recovered in an action. The Judge expressed himself "judicially satisfied" with the result. On appeal, the only question was whether, at the trial, the Judge should have directed a verdict for the defendants. Palles, C.B., and Murphy, J., in the Exchequer Division, held it competent to a jury to find that to push the plaintiff off while the car was in motion was an unreasonable and dangerous mode of removing him; and that though it was admitted that the plaintiff's conduct contributed to the accident, the issue whether the accident was caused by the defendants' negligence could not be withdrawn from them. In the Court of Appeal this decision was reversed, Barry, L.J., dissenting, by Lord Ashbourne, C., and Fitzgibbon, L.J. The majority of the Court held that the plaintiff was acting illegally and wrongfully in forcing his way when intoxicated into the tramcar; that by doing so he placed himself in a position of peril and the conductor in a position of difficulty; and assuming the conductor not to act with the most perfect presence of mind, it could not be said that he acted with such want of care as to cause the accident. The verdict was accordingly set aside, and judgment entered for the defendant. Barry, L.J., was of opinion there was evidence to go to the jury, and that the verdict was maintainable. An appeal to the House of Lords was abandoned. This is to be regretted, since the decision as it now stands is out of harmony with the authorities.

Delany v. The Dublin United Tramways Company.

Judgment of the Exchequer Division

reversed in the Court of Appeal, Barry, L.J., dissenting.

It is indisputable that where the issue of contributory negligence arises, the matter cannot be withdrawn from the jury.³ If then there was any evidence of negligence apart from the plaintiff's own conduct, the circumstances of his conduct would not avail to exclude that evidence from the jury. The majority in the Court of Appeal assumed that the plaintiff's conduct throughout was illegal and wrongful. Consideration will show this was not so. It is not illegal or wrongful for a drunken man to

Case commented on.

¹ *Holland v. North Metropolitan Tramways Company*, 3 Times L. R. 245; where Manisty, J., said that Davey's case was no longer an authority on this point. In *Coyle v. Great Northern Railway Company of Ireland*, 20 L. R. Ir. 409, all the cases are reviewed by Palles, C.B. There judgment was entered for defendants, as the undisputed facts showed affirmatively that C. crossing the line acted negligently, and that this negligence, if not the sole, was at least a contributory, cause of the accident.

² 30 L. R. Ir. 725.

³ *Dublin, Wicklow, and Wexford Railway Company v. Slattery*, 3 App. Cas. 1155.

travel in a tramcar. The company have an option to refuse to carry him; they may also, if they please, carry him without any illegality. The assumption on the drunken man's part that they will carry him, is, at the worst, an erroneous one. Till the company have elected whether they will exercise their right of refusal, he has a right of tendering himself as a passenger. He did this by getting on the tramcar while in motion. When he was there, the company by their conductor exercised their option not to carry him; and though their election could have no effect, on the previous conduct of one lawfully on the tramcar, till the option was exercised, he then became, what the Court of Appeal terms, a wrongdoer. Yet, having got there lawfully—or there being some evidence¹ that he was there lawfully—the company were bound to give him reasonable facilities for alighting. Here, then, is a question that cannot be withdrawn from the jury. Further, the judgment of the majority of the Court of Appeal, assumes the conductor not to have acted “with the most perfect presence of mind.” This must have reference to his pushing a drunken man off a moving car. Yet, if the considerations pointed out above are correct, this pushing was simultaneous with the election of the company not to carry a man whom they perfectly well might had they chosen; and so their conductor acted without due care in regard to one at the moment neither acting illegally nor wrongfully on the car.

Evidence of
aggravation,
Cooley v.
Edinburgh and
Glasgow Rail-
way Company.

In a Scotch case² it was sought by admitting the negligence sued on to shut out the pursuer from giving evidence of the facts constituting it, which were of an aggravated character. The Court defeated the attempt, holding that “the defenders are not entitled to step forward and say, because we admit our liability, you are not entitled to prove to the jury how the accident happened”: for it might be that the circumstances in which the accident happened would be ground for consideration in estimating the damages. In England, the same has, in effect, been decided on a motion for a new trial in the Exchequer against an alleged misdirection by Wilde, B.,³ that the jury ought to consider “the occasion and the motive and all the circumstances of the case.” The action was for negligence, and it was admitted that in trespass the direction would have been right, but it contended that where the gist of the action was negligence, the rule was different. The Court were, however, unanimous that the considera-

Emblen v.
Myers.

¹ That of the priest, 30 L. R. Ir. at 727. Fitzgibbon, L.J., at 750, says: “The plaintiff was acting unlawfully in *trying* to get up, the conductor was acting lawfully in preventing him.” But there was evidence that the plaintiff had *both* feet on the car.

² Cooley v. Edinburgh and Glasgow Railway Company (1845), 8 Dunlop 288.

³ Emblen v. Myers (1862), 30 L. J. Ex. 71, where the passage cited on the next page is given very much fuller than in 6 H. & N. 54.

tions objected to were admissible as elements for the consideration of the jury in the estimation of the damages. Pollock, C.B., pointed out the distinction between damage purely the result of accident for which the party responsible may be liable to compensate, though perfectly innocent, and damage the result of wilfulness or negligence accentuated so as to make the wrong an insult as well as an injury.¹ The learned judge, however, safeguards his expression by saying, "not that in this case what is called vindictive damage should have been given, but a different measure of damage might be fairly given according to the nature of the injury." Channell, B., added: "I can see no reason why that" (*i.e.*, damage beyond the actual injury sustained) "should be limited to one kind of action of tort, viz., trespass, and should not extend to an action which, in substance, is for negligence committed under circumstances which might have supported an action of trespass."

Another rule with regard to *onus*, rather in the nature of an exception to the principle expressed by Lord Halsbury's maxim, *Ei qui affirmat non ei qui negat incumbit probatio*, must be noticed; ^{Presumption against criminal neglect.} by which, where an act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative and throws the burthen of proving a non-performance—that is, of proving the negative on the other side; thus, the law will presume that a parson has read the Thirty-Nine Articles, where loss of his benefice is the penalty for omitting to do so.²

Generally then, it may be said that the burthen of proof lies ^{Summary.} on the party who substantially asserts the affirmative of the issue. *Ei incumbit probatio, qui dicit; non qui negat.*³ The tests of this are—(a) to consider which party would succeed if no evidence were given on either side;⁴ (b) to consider the effect of striking out of the record the allegation to be proved.⁵

To the general rule there are two main heads of exceptions:

(1) Where there is a presumption of law in favour of an affirmative allegation, the party who supports the negative must call witnesses to rebut the presumption.⁶

(2) Where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it.⁷

Most questions relative to the burthen of proof will be solved by the application of these tests.

¹ As to vindictive damages, *ante*, 49:

² *Monke v. Butler*, 1 Rol. Rep. 83. Lord Halifax's case, Bull. N. P. 298. Williams v. The East India Company, 3 East 192. ³ Dig. 22, 3, 2.

⁴ *Amos v. Hughes*, 1 M. & Rob. 464, per Alderson, B.

⁵ *Mills v. Barber*, 1 M. & W. 425, at 427, per Alderson, B.

⁶ *Williams v. East India Company*, 3 East 192; *Toleman v. Portbury*, 39 L. J. Q. B. 136.

⁷ *Dickson v. Evans*, 6 T. R. 57, at 59, per Ashhurst, J.; *R. v. Turner*, 5 M. & S. 206, at 211, per Bayley, J.

CHAPTER V.

CONTRIBUTORY NEGLIGENCE.

Rule of the
Roman law.

THE rule of the Roman law on contributory negligence is short and explicit : *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire* :¹ (The harm I bring upon myself I must bear myself.) This is illustrated by a decision of Paulus : *Ei, qui irritatu suo feram bestiam vel quamcumque aliam quadrupedem in se proritaverit, eaque damnum dederit, neque in ejus dominum neque in custodem, actio datur*.²

Two theories
in English
law.

The question, What is the harm I bring upon myself? admits of the widest differences of interpretation. Two separate views have been expressed, and have (each in its time) received judicial sanction. The first is, the plaintiff must satisfy the jury that the injury complained of was caused solely by negligence for which the defendant is answerable.³

The second contention may be summed up in two propositions : First, the plaintiff, though guilty of negligence, is not disentitled to recover if the defendant might have prevented the injury by the exercise of ordinary care.⁴ Secondly, the defendant, though guilty

¹ Dig. 50, 17, 203. Cp. D. 9, 2, 9, § 4; D. 9, 2, 11, pr.; D. 9, 2, 28, pr.; D. 9, 2, 31, pr.

² Sent. Rec. I. 15 § 3. The *actio in dominum* is the *actio de pauperie*, which is applicable if an animal has done damage to another *contra naturam sui generis*. D. 9, 1, 1, §§ 5, 6. The *actio in custodem* is the Aquilian action.

³ See a series of cases, *Vanderplank v. Miller* (1828), *Moody & M.* 169; *Pluckwell v. Wilson* (1832), 5 C. & P. 375; *Luxford v. Large*, 5 C. & P. 421; *Hawkins v. Cooper* (1838), 8 C. & P. 473; *Martin v. Great Northern Railway Company* (1855), 16 C. B. 179; this case goes rather on the ground of defendants' acquiescence in a wrong direction; and per Brett, J., addressing the House of Lords in *Bridges's case*, L. R. 7 H. L., 213, at 232-3; also when charging the jury in *Radley v. London and North-Western Railway Company*, 1 App. Cas. 755; again the same judge in the Court of Appeal, as M.R., in *Davey v. London and South-Western Railway Company*, 12 Q. B. Div. 70, at 71, with the following addendum: "Solely by the defendants' negligence in this sense, that he himself was not guilty of any negligence which contributed to the accident, because even though the defendants were guilty of negligence which contributed to the accident, yet if the plaintiff also was guilty of negligence which contributed to the accident so that the accident was the result of the joint negligence of the plaintiff and of the defendants, then the plaintiff cannot recover, it being understood that if the defendants' servants could by reasonable care have avoided injuring the plaintiff, although he was negligent, then the negligence of the plaintiff would not contribute to the accident," *ante*, 161.

⁴ *Smith v. Pelah* (1747), 2 Str. 1264; *Bird v. Holbrook* (1828), 4 Bing. 628;

of negligence, is not liable to the plaintiff if the plaintiff might have prevented the injury by the exercise of ordinary care.¹ This, in effect, makes the question of liability to turn on a finding of fact which of the two parties, plaintiff or defendant, was guilty of the last act of negligence previous to the injury—that is, the last act without which the accident would not have happened.² In this view the question of contributory negligence can never be withdrawn from the jury; for the decision of it necessitates the discriminating between different sets of facts, and this is their peculiar province.

The case usually referred to as the first which definitely formulated the rule of law is *Butterfield v. Forrester*.³ It was an action for obstructing a highway, whereby the plaintiff, who was riding violently, rode against the obstruction and was injured. Bayley, J., at the trial, directed the jury that, if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely hard and without ordinary care, they should find for the defendant; which they accordingly did. A rule was moved for on the authority of a passage in Buller's "*Nisi Prius*:" "If a man lay logs of wood across a highway, though a person may, with care, ride safely by, yet, if by means thereof my horse stumble and fling me, I may bring an action." Lord Ellenborough, C.J., in refusing it, thus laid down the rule of law: "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." This was approved and adopted by the Court of Exchequer in *Bridge v. Grand Junction Railway Company*; ⁴ Parke, B., saying: "The rule of law is laid down

Butterfield v. Forrester.

Statement of the rule by Lord Ellenborough, C.J.

Bridge v. Grand Junction Railway Company.

Vennall v. Garner (1832), 1 Cr. & M. 21; *Marriott v. Stanley* (1840), 1 M. & G. 568; *Smith v. Dobson* (1841), 3 M. & G. 59, where the Court refused, *on the motion of the defendant*, to grant a new trial on the ground that the jury had reduced the damages because they thought that the plaintiff was partly in fault; *Springett v. Ball*, 4 F. & F. 472, with an exhaustive note of the earlier cases.

¹ *Flower v. Adam* (1810), 2 Taunt. 314, a case that admirably illustrates the reason of the rule of law as to contributory negligence; *Lack v. Seward* (1829), 4 C. & P. 106; *Woolf v. Beard*, 8 C. & P. 373; *Sills v. Brown* (1840), 9 C. & P. 601; *Raisin v. Mitchell*, 9 C. & P. 613.

² *Tuff v. Warman*, 5 C. B. N. S. 573, at 585; *Walton v. London, Brighton, and South Coast Railway Company*, H. & R. 424.

³ (1809) 11 East 60. In giving judgment in the *Bernina* (No. 2), 12 P. Div. 58, at 70, Lord Esher, M.R., says: "The rule of law was laid down with perfect correctness in 1809, in the case of *Butterfield v. Forrester*, and the rule is, that although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover."

⁴ (1838) 3 M. & W. 244. In *Holden v. Liverpool New Gas and Coke Company*, 3 C. B. 1, negligence on the part of the plaintiff was held an admissible defence under

Statement of the rule by Parke, B.

Adopted by
the Court of
Common
Pleas.

with perfect correctness in the case of *Butterfield v. Forrester*; and that rule is, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong." Two years later,¹ the Court of Common Pleas adopted the same rule, by refusing a new trial on the ground of misdirection, in directing the jury, in an accident case, that, if the plaintiff had been so deficient in reasonable and ordinary care that he had brought the accident upon himself, he was disentitled to recover. In *Davies v. Mann*,² again, cited, probably, more often for the peculiarity of the facts than for any additional clearness it gives to the exposition of the rule of law, the rule in *Butterfield v. Forrester* is declared to be expressed with perfect correctness.

Rigby v.
Hewitt and
Greenland v.
Chaplin.

The cases of *Rigby v. Hewitt*³ and *Greenland v. Chaplin*,⁴ judgment in which was given in the Court of Exchequer on the same day, are important. In the former, the plaintiff was a passenger on the top of an omnibus which was struck by the defendant's omnibus, both omnibuses going with great speed. The consequence was, that the omnibus on which the plaintiff was, not being able to be drawn up, and continuing its career, ran against some obstacle, and the plaintiff was thrown off with considerable violence. Rolfe, B., directed the jury to ascertain whether the mischief arose from the negligence of the driver of the defendant's omnibus. This was objected to, and a new trial was moved for on the ground that the direction should have been that if the mischief was, in part, occasioned by the misconduct of the person driving the omnibus on which the plaintiff was, the defendant would not be responsible. The Court, however, held that, "generally speaking, where an injury arises from the misconduct of another, the party who is injured has a right to recover from the injuring party

the plea of not guilty. Under R. S. C. 1883, Order xix. r. 4, contributory negligence must be pleaded. See the pleadings in *Wakelin v. London and South-Western Railway Company*, 12 App. Cas. 41. *Dakin v. Brown*, 8 C. B. 92: a plea denying liability for the consequences of negligence is bad.

¹ (1840) *Marriott v. Stanley*, 1 M. & G. 568.

² (1842) 10 M. & W. 546. The question is, "Whether the defendant, by ordinary care and skill, might have avoided the accident?" *Dowell v. General Steam Navigation Company*, 5 E. & B. 195. Where a vessel is run down by night, and there is evidence of neglect of Admiralty regulations in not displaying a light, such negligence, if not the immediate cause of the accident, does not disentitle from recovering damages against the injuring vessel. *Morrison v. General Steam Navigation Company*, 8 Ex. 733. In *Mayor of Colchester v. Brooke*, 7 Q. B. 339, it was held that the fact that a nuisance is constituted by property of the plaintiff, is no excuse for negligently injuring it. And, in *Dimes v. Petley*, 15 Q. B. 276, a private individual cannot justify damaging the property of another on the ground that it is a nuisance to a public right, unless it does him a special injury.

³ (1850) 5 Ex. 240.

⁴ 5 Ex. 243.

for all the consequences of that injury." *Greenland v. Chaplin* is to the same effect. A steamboat, belonging to the defendant, negligently ran against a steamboat on board which the plaintiff was a passenger, in consequence of which an anchor was displaced, fell over, and broke the plaintiff's leg. Pollock, C.B., directed the jury that if they thought that there was negligence in the stowage of the anchor, or that the accident arose from the plaintiff being in a part of the vessel where he ought not to have been, they ought to find for the defendant. The jury found as facts that neither the one nor the other of those matters in reality existed. A new trial was moved for on the ground that the verdict was against the evidence; but the Court refused a rule, Pollock, C.B., saying: "I may add that, on consideration, I am of opinion that the law as laid down by me in this respect was not correct. I entirely concur with the rest of the Court that a person who is guilty of negligence, and thereby produces injury to another, has no right to say 'Part of that mischief would not have arisen if you yourself had not been guilty of some negligence.' I think that where the negligence of the party injured did not, in any degree, contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action; and certainly I am not aware that, according to any decision which has ever occurred, the jury are to take the consequences and divide them in proportion according to the negligence of the one or the other party."¹

The question, What amount of negligence disentitles the plaintiff to recover? was considered in the Exchequer Chamber in *Tuff v. Warman*.² Plaintiff's barge was proceeding down the river with two men on board, one at the helm; but there was no look-out. A steamer on her right side, and taking such precautions that, if the barge had done the same, would have avoided any collision, ran into the barge and caused the injuries for which redress was sought. The jury found, on the direction of the judge, that the defendant directly caused the injury. Objection was taken that the judge left to the jury whether the plaintiff, by his negligence, "*directly*" contributed to the misfortune; and it was contended for the defendants that whether he directly or indirectly contributed was immaterial, if he contributed to it by his negligence at all. In the Court of Common Pleas, Cockburn, C.J., said: "The true question in these cases is, whether the

What amount of negligence disentitles the plaintiff to recover: *Tuff v. Warman*.

Judgment of Cockburn, C.J., in the Court of Common Pleas.

¹ An attempt by the jury to do so was made in *Ayres v. Bull*, but was corrected by the Divisional Court, 5 Times L. R. 202. See *Smith v. Dobson*, 3 M. & G. 59; *The Arratoon Apar*, 15 App. Cas. 37.

² 2 C. B. N. S. 740, 5 C. B. N. S. 573, 585. This decision is made the occasion for verses, "Contributory Negligence, A Law Lay," 17 Law Mag. and Rev. 234.

damage having been occasioned by the negligence of the defendant, the negligence of the plaintiff has directly contributed to it; and I think that in this case, if the defendant could have made out negligence on the part of the plaintiff that would have been an answer to the action. The way in which it was put on the part of the defendant was this, that by his own negligence in omitting to keep any look-out, the plaintiff contributed to the accident. If that had been established to the satisfaction of the jury, the plaintiff would have been directly contributory, and the defendant would have been entitled to a verdict."¹ Cresswell, J., concurs in the result, but cites the words of Lord Campbell in *Dowell v. General Steam Navigation Company*,² adopting the view expressed in *Davies v. Mann*³ as his reason for arriving at his conclusion. Williams, J., based his concurrence on the same decision, and added: "I dissent entirely from the proposition urged by Mr. Collier, that the plaintiff is disentitled to recover if his negligence is either proximately or remotely connected with the accident. But I feel great difficulty in dealing with the question whether the negligence was proximate or remote, and I certainly feel great difficulty in getting rid of that question of law by leaving it to the jury." In giving the judgment of the Exchequer Chamber,⁴ Wightman, J., said: "It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case the plaintiff would be entitled to recover, in the latter not; as, but for his own fault, the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such, that, but for that negligence or want of ordinary care the misfortune *could*⁵ not have happened; nor, if the defendant

¹ 2 C. B. N. S. 740, at 755.

² 5 E. & B. 195, at 206.

³ 10 M. & W. 546.

⁴ 5 C. B. N. S. 573, at 585. Wightman, Erle, Crompton, JJ., Watson, Bramwell, and Channell, BB., constituting the Court.

⁵ In *Walton v. London, Brighton, and South Coast Railway*, H. & R. 424, at 430, Willes, J., quotes this as "would not have happened"; and further on, in the judgment, takes exception to the use of the word "could" for "would." And where the same passage is cited in the argument in *Radley v. London and North-Western Railway Company*, in the House of Lords, 1 App. Cas. 754, at 757, the word is "*would*," not "*could*." The word "*would*" also occurs in the Law Journal Reports, 27 L. J. C. P. 322, and in the Jurist, 5 Jur. N. S. 222. This last report is by far the best of those reporting the case in the Exchequer Chamber. The word "*could*" is obviously a mistake; common sense satisfies us that what the Court intended to negative, was not *possibility*, what *could* have happened; but *probability*, what *would* have happened. The rule laid down in *Tuff v. Warman* has been unfavourably criticised in *Murphy v. Deane*, 101 Mass. 455, at 463.

Judgment of
the Exchequer
Chamber
delivered by
Wightman, J.

Of Cresswell, J.

Of Williams, J.

might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff."

It is to be noted that the decision of Cockburn, C.J., is based on an assumed finding of the jury that the plaintiff had not omitted to keep a look-out, and that therefore he had not contributed to the injury. If the finding had been the other way, and the jury had found that the plaintiff had omitted to keep a look-out, it would seem that Cockburn, C.J., would have been prepared to enter a verdict for the defendants. This must have been on the ground that any negligence on the part of the plaintiff would entitle the defendant to the verdict. He says: "I think that in this case if the defendant could have made out negligence on the part of the plaintiff, that would have been an answer to the action. If that had been established to the satisfaction of the jury (*i.e.*, that by his own negligence in omitting to keep any look-out, the plaintiff contributed to the accident) the plaintiff would have been directly contributory, and the defendant would have been entitled to a verdict." The other judges most clearly do not hold this opinion; since Williams, J., thus summarizes the principle of *Dowell v. General Steam Navigation Company*,¹ on which they acted: "If the negligence or default of the plaintiff was in any degree the proximate cause of the damage he cannot recover, however great may have been the negligence of the defendant; but that if the negligence of the plaintiff was only remotely connected with the accident, then the question is, whether the defendant might not, by the exercise of ordinary care, have avoided it." Williams, J.'s, doubt was, "What is meant by the negligence of the plaintiff being *proximately*, or *directly contributory*, or *only remotely connected* with the accident." The special difficulty, in his view, was that whether the negligence was proximate or remote was for the jury. This, then, is inconsistent with the judgment of Cockburn, C.J. The jury, in effect, have to find, first, the negligence of the defendant, then the negligence of the plaintiff, then whether the negligence of the plaintiff was proximately or remotely the cause of the accident. In the view of Cockburn, C.J., when negligence has been established against the plaintiff he is thereon disentitled to recover. The question of *proximity* or *remoteness* does not enter into his judgment; but is the source of the perplexity of Williams, J. The Exchequer Chamber is, however, clear in holding that the plaintiff's negligence must be such that "but for that negligence or want of ordinary care and caution, the misfortune '*would not*'² have happened."

Discussion.

Williams, J.'s,
summary of
the principle of
Dowell v.
General Steam
Navigation
Company.

¹ 5 E. & B. 195.

² See previous page, note 5.

Willes, J.'s,
view of Tuff
v. Warman.

In *Walton v. London, Brighton, and South Coast Railway Company*,¹ Willes, J., summarized *Tuff v. Warman* as deciding that the use of the words "directly causing" was not wrong, since, in cases where there has been negligence on the part of the plaintiff, the question is, whether that was the direct cause of the accident or proximately contributed to it. The learned judge alludes to Williams, J.'s, doubt in the words: "It ought to have been left to the jury to say whether there was negligence on the part of the plaintiff. If there was evidence on the part of the plaintiff, the further question arises whether that negligence was the proximate or direct cause of the accident."

Radley v.
London and
North-
Western
Railway
Company.

Radley v. London and North-Western Railway Company definitely fixed the law.² The plaintiffs, colliery owners, had a siding adjoining the defendants' line, which was crossed by a bridge, and on which the defendants were in the habit of conveying the plaintiffs' trucks from their line, the plaintiffs removing them thence as they thought fit. The defendants brought to the plaintiffs' siding and left there, after working hours, trucks of the plaintiffs, one of which was loaded with a broken truck to such a height that it would not pass under the bridge. More than twenty-four hours afterwards, but before work was resumed at plaintiffs' works, the defendants, after dark, pushed on to the siding other trucks of the plaintiffs, and pushed the loaded trucks up to the bridge, by which means the train of trucks was arrested. The defendants' servants, not being aware of the cause of the obstruction, pushed the train of trucks forward with so much force that the loaded trucks knocked down the bridge.³ The plaintiffs brought an action against the railway for negligence. At the trial, Brett, J., told the jury:⁴ "You must be satisfied that the plaintiffs' servants did not do anything which persons of ordinary care, under the circumstances, would not do, or that they omitted to do something which persons of ordinary care would do." "It is for you to say entirely as to both points, but the law is this: The plaintiffs must have satisfied you that this happened by the negligence of the defendants' servants, and without any contributory negligence of their own—in other words, that it was solely by the negligence of the defendants' servants. If you think it was, then your verdict will be for the plaintiffs. If you think it was not solely by the negligence of the defendants'

¹ H. & R. 424.

² (1874) L. R. 9 Ex. 71; in Ex. Ch., L. R. 10 Ex. 100; in H. of L., 1 App. Cas. 754; followed in *Inland and Seaboard Coasting Company v. Tolson*, 139 U.S. (32 Davis) 551, 558.

³ The foregoing statement is copied from the head-note to the report in L. R. 9 Ex. 71.

⁴ App. Cas. 754, at 755.

servants, your verdict must be for the defendants." The jury thereupon said they thought there was contributory negligence on the part of the plaintiffs, and the judge directed the verdict to be entered for the defendants, with leave to move. A rule for a new trial was made absolute by the Court of Exchequer,¹ on the ground that there was no evidence of contributory negligence, and also on the ground that the judge had misdirected the jury; the Exchequer Chamber² reversed this on both points. On appeal, the House of Lords³ reversed the judgment of the Exchequer Chamber, and restored that of the Court of Exchequer. Lord Penzance, who delivered the leading opinion in the House of Lords, declared the law to be contained in two propositions: "The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first—namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet, if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."⁴

Lord Penzance's judgment adopted in the House of Lords.

Much of the difficulty in fixing the meaning of contributory negligence arises from the ambiguous use of the phrase, "contributing to the injury." This may indicate any of the whole set of antecedents necessary to produce the effect, or that one of them which marks their final completion and the actual calling into being of the effect. The *causa sine qua non* of an accident is not that on which depends the legal imputability of the accident. The liability depends not on that, but on the *causa*

Ambiguous use of the phrase "contributing to the injury."

¹ Bramwell and Amphlett, BB.

² Blackburn, Mellor, Lush, Brett, and Archibald, JJ.; dissenting, Denman, J.

³ Lord Penzance, Lord Cairns, C., Lord Blackburn, and Lord Gordon.

⁴ 1 App. Cas. 754, at 759. In America it was sought to limit contributory negligence by requiring that before the plaintiff should be disentitled to recover, it should be shewn that his own negligence contributed "in a material degree" to the accident. This rule, which is firmly established in Illinois, is referable to the judgment in *Galena Railroad Company v. Jacobs*, 20 Ill. 478. But in the Supreme Court of Pennsylvania a direction to the jury to that effect was held wrong: *Monongahela City v. Fisher*, 111 Pa. St. 9; and the correct doctrine was laid down to be, that if the negligence of the party contributed in any degree to the injury he cannot recover. "This," said Paxson, J. (at 14), "is a safe rule, easily understood, and cannot well be frittered away by the jury. But, if we substitute the word 'material' for the word 'any,' we practically abolish the rule, for a jury can always find a way to avoid it." The vastly preponderating weight of American legal opinion is found in favour of this view. *Sutton v. Wauwatosa*, Bigelow, L.C., on Torts, 711. Cp. *Spaight v. Tedcastle*, 6 App. Cas. 217. In Scotland, Lord President Inglis, in *Florence v. Manor*, 18 Rettie 247, 249, says: "I do not know any better exposition of the doctrine of contributory negligence" than that by Lord Wood in *M'Naughton v. Caledonian Railway Company*, 21 Dunlop 160, 166.

efficiens.¹ In fact the same test is applicable to the ascertaining what negligence contributes to an injury, as we have already applied to the ascertaining negligence itself. We must trace the negligent consequences to the last responsible agent, who, either seeing the negligent consequences or negligently refusing to see them, has put into motion the force by which the injury was produced. To constitute a responsible agent there must be an accountable human will.

Import of the rule of law as to "contributory negligence."

Viewed in this light, contributory negligence is but the recognition under special circumstances of a principle running through the whole law of negligence—that where a responsible agent is placed in such a position with regard to the person or property of any one possessing rights that want of ordinary care on the part of such responsible agent would, according to the accustomed course of events, produce injury to either person or property, a duty arises to use ordinary care, so that when injury happens from the absence of ordinary care an actionable wrong is the result. The peculiarity, in the case of contributory negligence, is that it proceeds on the assumption that both plaintiff and defendant have been guilty of some breach of duty; and the inquiry is limited to which of the two, by exercising ordinary care, had the last opportunity of preventing the occurrence.² In a case of ordinary negligence, the inquiry is whether the defendant is guilty of want of ordinary care, and, if so, whether, after his neglect, any other agency whatever has or might have diverted the course of the operations. The conclusion is, that contributory negligence is no more than a case of negligence, not dependent on any different rule of law, though presupposing the limitation of the issue of negligence to an inquiry to which of two persons its final impulsion should be imputed.

Conclusion.

The rule that contributory negligence disentitles the injured person to recover is limited to those cases where there is a causal connection between the plaintiff's negligence and the injury.

¹ The Aristotelians recognized four kinds of causes:—1. τὸ τί ἦν εἶναι—the essence, the formal cause; 2. τὸ τίνα δυνάμει τοῦτ εἶναι—the necessitating conditions, the material cause; 3. ἡ τί πρῶτον ἐκίνησε—the proximate mover, the efficient cause; 4. τὸ τίνα ἕνεκα—that for the sake of which, the final cause (Analyt. Post. II. xi. 94, a 21–36). Grote, Aristotle, vol. i. 354. The second of these might be the contribution of the plaintiff to the result, but would not preclude his recovering, if the third, the efficient cause, was the negligence of the defendant. The subject of causation is scientifically investigated by J. S. Mill in his Logic, Book III. c. v. Of the Law of Universal Causation, developing the suggestions of Hume's Inquiry Concerning Human Understanding. For illustrations of the *causa causans* and the *causa proxima*, see judgment of Brett, L.J., Chartered Mercantile Bank of India, v. Netherlands India Steam Navigation Company, 10 Q. B. Div. 521, 531.

² Spaight v. Tedcastle, 6 App. Cas. 217, 219; Cayzer v. Carron Company, 9 App. Cas. 873, 886.

The ground of the decision in *Scott v. Shepherd* was that the act of the intermediate persons who threw the squib was involuntary and unpremeditated, and without distinct and independent volition, and therefore, as the act was instinctive, the actual proximate agent of the injury was not the responsible agent. The same reason operates to take from acts done in certain states of mind, or by certain classes of people, the note of responsibility; and enables the doers of such acts to recover, notwithstanding that their conduct, if divested of the exceptional conditions surrounding and colouring it, would impute contributory negligence to them. For example: Persons who, in a sudden emergency, are distracted by terror, and thus, between two courses, choose the wrong one, are not disentitled to recover.¹ This is plain; for the very state of incapacity to judge calmly, which is the provocation to the improvident act, is produced by the hypothetically negligent act of the defendant. To hold that a plaintiff is disentitled to recover in such a case would be to hold that the defendant, having aggravated his negligence by those circumstances of terror which deprived the plaintiff of his power of avoiding the consequences, or which, irresistibly by the plaintiff, drove him upon the danger, could set up the state of terror produced by his wrongful act as a protection against the consequences.² The principle is thus laid down by Johnson, J., in the New York Court of Appeals:³ "There can be no rule of law which imposes it as a duty upon one, over whom danger impends by the negligence of another, to incur greater danger by delaying his efforts to avoid it until its exact nature and measure are ascertained. The instinctive effort on the part of the plaintiff to avoid the danger did not relieve the defendant from responsibility."

In the Court of Appeals of New York there was a striking case⁴ on this branch of the law, in which the Court laid down a rule that it would not impute negligence to an effort to preserve human

Exceptional cases.

Sudden terror.

Negligence not imputed to effort to save human life.

¹ *Jones v. Boyce*, 1 Stark. (N.P.) 493. The case of an engineer remaining at his post, and so injured, scarcely comes under this principle. Yet it has been held in America that such an one "is not necessarily negligent." *Central Railroad v. Crosby*, 58 Am. R. 463.

² *Jones v. Boyce*, 1 Stark. (N.P.) 493, 495.

³ *Coulter v. The American Merchants' Union Express Company*, 56 N. Y. 585, 588, following *Buel v. New York Central Railroad Company*, 31 N. Y. 314.

⁴ *Eckert v. Long Island Railroad Company*, 43 N. Y. 502; approved, *Linnahan v. Sampson*, 126 Mass. 506. In *Donahoe v. Wabash Railroad Company*, 53 Am. R. 594, at 595 the principle is stated: "It is only when the railroad company by its own negligence created the danger or through its negligence is about to strike a person in danger, that a third person can voluntarily expose himself to peril in an effort to rescue such person and recover for an injury he may sustain in the attempt." See *Peyton v. Texas, &c., Pacific Railroad Company*, 41 La. Ann. 861; 17 Am. St. R. 430; *Gibney v. State*, 137 N. Y. 1; 33 Am. St. R. 690.

life. A little child of three or four years old got on the railway track in East New York as a train of cars was coming along at a rate of speed estimated, by the plaintiff's witnesses, at from twelve to twenty miles an hour; by the defendants', at not over seven or eight. The plaintiff's husband, seeing the danger of the child, ran on the track, threw the child clear, but was himself caught by the train and killed. The jury found negligence on the part of the defendants. An exception was taken, on the ground that the deceased's negligence contributed to the injury. The majority of the Court of Appeals held that the deceased "owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself." Two of the Court dissented, on the ground that "principles of law cannot yield to particular cases;" that the act of the deceased was "a voluntary act, the performance of a self-imposed duty, with full knowledge and apprehension of the risk incurred."¹

Eckert v.
Long Island
Railroad
Company
discussed.

It is clear that, if the defendants were not guilty of negligence, the plaintiff could not have recovered. Their negligence, in the case, seems to have been the going at too great speed through a town. The ground on which the decision is justified—"instinctive humanity"—is somewhat vague and rhetorical though possibly sound, and is at any rate recognised by Cockburn, C.J., in *Scaramanga v. Stamp*,² when he says "the impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity." There are expressions in some of the judgments that point to the conclusion that the act of intervention must be in circumstances where the intervener can act "without incurring great danger to himself." This is assuredly a wrong test. By the negligence of the defendants human life is endangered. "The duty of important obligation," which the judges held to have been owing by the deceased to the child, does not become less by the greater imminency of the danger, but rather greater. The justification of the act is, that the negligence of the railway company, working through feelings akin to those which prompted the rash leap in *Jones v. Boyce*, has caused an act that is either instinctive or obligatory;³ and which, having

¹ In *Cook v. Johnson*, 55 Am. R. 703, it was held that one injured while exposing himself to danger in order to save his property was guilty of contributory negligence; and *à fortiori* if he were endeavouring to save any one else's.

² 5 C. P. D. 295, at 304.

Dicta of Lord
Coleridge on
moral and
legal duties
discussed.

³ "To preserve one's life is, generally speaking, a duty; but it may be the plainest and highest duty to sacrifice it": per Lord Coleridge, C.J., in the *Queen v. Dudley*, 14 Q. B. D. 273, at 287. The caution given by an eminent legal writer (Holmes, *The Common Law*, 148)—"Moral predilections must not be allowed to influence our minds in settling legal distinctions"—must most specially be observed in a case like *Queen v. Dudley*, Reference to *United States v. Holmes*, 1 Wall Jr. (U. S. Circ. Ct.) 1, will

been rendered necessary or expedient by the failure of the railway company to perform its duty, affects them with responsibility for its consequences. If the act of the deceased were instinctive, it comes under the class of cases to which we have already alluded ; if it were deliberate, its justification must be sought on some such

shew that it is by no means the ill-considered and ludicrous decision that it would appear to be from the Lord Chief Justice's reference to it ; and Story, J., no contemptible authority, writes : " Principles going much deeper into human feelings and morals and rights have not insisted on such an overwhelming sacrifice of personal preference. If two men are on a plank at sea, and it cannot save both, but it may save one, it has never yet been held that in a common calamity and struggle for life either party was bound to prefer the other's life to his own. If a ship is capsized at sea, and the ship's boat is sufficient to save a part of the crew only, is there a known duty to prefer a common destruction of all to the safety of a part ? If the crew of a foundered ship are dying from hunger at sea, are all to perish, or may they not cast lots for life or death to preserve the rest ? These cases are put merely to show that, in a common calamity, the law does not look to mere heroism, or chivalry, or disinterested sacrifices. If it has furnished no rule for such cases, it is because they are incapable of any, for necessity has no law " : Story, Bailm., 251. As to Lord Coleridge's question, " Who is to be the judge of this sort of necessity ? " the answer might not unreasonably be—the same as in every other case of fact—the jury, who would say whether the situation and circumstances justified the act ; and at the moment, as in many other circumstances—*e.g.*, shooting a burglar—the man would act at his peril.

Story, J.'s
view.

The writer before cited, Mr. Justice Holmes, discussing certain doctrines in which he contends the law subordinates consideration of the individual, to that of the public, well-being, says : " The first of these is, that even the deliberate taking of life will not be punished when it is the only way of saving one's own. This principle is not so clearly established as the next to be mentioned ; but it has the support of very great authority. If that is the law, it must go on one of two grounds, either that self-preference is proper in the case supposed, or that, even if it be improper, the law cannot prevent it by punishment, because a threat of death at some future time can never be a sufficiently powerful motive to make a man choose death now in order to avoid the threat. If the former ground is adopted, it admits that a single person may sacrifice another to himself, and *à fortiori* a people may." Blackstone, 1 Comm. 123, divides the rights of individuals into absolute and relative—absolute being " such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it ; " but relative rights result from these, " so that to maintain and regulate these is clearly a subsequent consideration." If so, how can it be argued, apart from morality, that there is a *legal* obligation to abstain from sacrificing a life for the preservation of one's own ? In the United States Art. IX. of Amendments to the Constitution, " The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," would seem to apply to such a case where society, unable to render assistance, becomes disentitled to impose obligations. However that may be, none of these considerations is touched upon in the judgment of the Queen's Bench Division, which, though a binding authority here, if ever discussed in other systems of law, may not improbably be described, in the words the judgment uses with regard to *United States v. Holmes*, as " hardly an authority satisfactory to a Court in this country," and that without impugning the actual decision. *Vin. Abr. Necessity*, which is mainly a reproduction of Bacon's Maxims, Reg. 5, *Necessitas inducit privilegium quoad jura privata*. Pufendorf, *Le Droit de la nature et des gens*, liv. 2, ch. 6, " Du droit et des privilèges de la nécessité." See, too, an article " Homicide by Necessity," *Law Quarterly Review*, vol. i. 51. As to the morals of the case, these are admirably treated by the captain of a crew wrecked on the coast of Newfoundland, whose words are recorded in Hakluyt's *Voyages* (ed. 1600), vol. iii. 129. " The Voyage of M. Hore and divers other gentlemen to Newfoundland & Cape Briton in the yere 1536 and in the 28 yere of King Henry the 8," at 130, 131 ; where will also be found an account of the king's conduct when the matter was brought to his knowledge. *The Queen v. Instan* (1893), 1 Q. B. 450, may be compared with the *Queen v. Dudley*. Lord Coleridge's remarks upon legal duty and moral obligation, and his deductions therefrom, may be somewhat bewildering, but a clear justification of the decision is that the defendant, as the verdict found, undertook the performance of duties, the non-discharge of which accelerated the death of the person to whom the duties so undertaken were owing. Austin's Fifth Lecture, *Province of Jurisprudence*, Determined, has no little bearing on the subjects suggested by Lord Coleridge,

Mr. Holmes's
view.

Difference
between moral
and legal
duties
illustrated.

no recovery of damages ; for the damages assessed for the wife would be recovered for the husband.¹ Now, under the Married Women's Property Act, 1882,² a married woman can sue alone, as though she were a single woman, for torts done to herself, and the damages recovered by her become her separate property.³ All question of imputability in this case is therefore avoided.

Garmon v. Bangor, where one of two people has knowledge of defect, but injury is caused by the other, who is ignorant, acting for the first.

A curious contention was advanced in *Garmon v. Bangor*,⁴ where plaintiff sued for an injury received through defect in a highway, of which he was aware, but of which his son, who was driving him, and through whose ignorance the injury happened, was ignorant. The knowledge of the plaintiff, it was urged, was the knowledge of the son ; and the plaintiff was therefore disentitled to recover by reason of contributory negligence. The Court refused their assent to so novel a principle, and were of opinion that the defendant was not prejudiced by a direction that, if the plaintiff did not inform his son of the defect, it was for the jury to determine whether he was guilty of neglect or want of ordinary care in neglecting so to inform him ; if he were, he was not entitled to recover, since the driver would be bound to use ordinary care, and, in that point of view, his knowledge of defects was important to be considered ; but that the knowledge of the owner of the team could have no influence upon his conduct.

Imputability of the negligence of parents or guardians to young children.
I. Fathers and masters suing in their own names.
II. Two classes of cases—
(i.) Where the child itself is guilty of negligence.
(ii.) Where the persons having charge of the child are guilty of negligence.

In considering the question of the imputability of the negligence of parents or guardians to young children, the cases of fathers suing in their own names for injury to their children and masters suing for injury to apprentices must be first moved out of the way. In these cases the negligent adult sues, on his own behalf, not for the benefit of the infant ; and it is contrary to all rule to allow one of sound mind and understanding to profit by a negligence of which he is partially the cause.⁵ These cases are quite clear ; the difficulty only arises where the damages are sought for the benefit of the young child injured. A twofold division of the cases under this head may be made—(1) those where the child personally is guilty of what in an older person would be negligence ; and (2) those where the persons having charge of a child have negligently placed the child, or permitted it to be, in a position in which it sustains injury.⁶

¹ *Newton v. Hatter*, 2 Ld. Raym. 1208 ; *Dalton v. Midland Counties Railway Company*, 13 C. B. 474.

² 45 & 46 Vict., c. 75, s. 1, sub-s. 2. ³ *Beasley v. Roney* (1891), 1 Q. B. 509.

⁴ 38 Me. 443. "Ordinary care" is discussed in this case ; also in *Beers v. Housatonic Railroad Company*, 19 Conn. 566.

⁵ *Glassey v. Hestonville, &c., Railroad Company*, 57 Pa. St. 172, at 174.

⁶ *Gardner v. Grace*, 1 F. & F. 359. "The doctrine of contributory negligence does not apply to an infant of tender age. To disentitle the plaintiff to recover, it must be shewn that the injury was occasioned entirely by his own negligence" : per Channell, B.

*Lynch v. Nurdin*¹ is the most often cited case of a child acting in such a way as would constitute negligence in an older person. Defendant negligently left a cart unattended; the plaintiff, a child of seven, got upon the cart in play; another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt. It was here held that the plaintiff could recover, on the ground, as explained by Parke, B., in a subsequent case,² that the plaintiff had taken as much care as could be expected from a child of tender years—in short, that the plaintiff was blameless, and consequently that the act of the plaintiff did not affect the question. To guard against a natural, perhaps, though illicit extension of this principle, in a subsequent case it was laid down that the mere fact of an accident occurring to a very young child will not raise a presumption of negligence any more than in the case of an adult.³ Negligence must be proved in the defendant: the fact that injury has resulted, and to a child himself incapable of negligence, will not import the negligence of the defendant, which is the sole ground of liability.

The often-quoted case of *Mangan v. Atterton*⁴ is at variance with the cases of which *Lynch v. Nurdin* is the leading authority. The defendant there exposed a machine for crushing oil-cake in the street, and without superintendence. The plaintiff, a boy of four years old, was coming past the machine from school in company with his brother, aged seven, and, by direction of his brother, put his fingers in the cogs and got them crushed. The Court held that an action was not maintainable: by Martin, B., on the ground that, admitting negligence, the negligence “was too remote a cause of the mischief” to make the defendant liable; “the accident was directly caused by the act of the boy himself;” by Bramwell, B., because: “The defendant is no more liable than if he had exposed goods coloured with a poisonous paint and the child had sucked them. It may seem a harsh way of putting it, but, suppose the machine had been of a very delicate construction, and had been injured by the child’s fingers, would not the child, in spite of his tender years, have been liable to an action as a tortfeasor? This shews that it is impossible to hold the defendant liable.”

¹ 1 Q. B. 29; *Lay v. Midland Railway Company*, 34 L. T. (N. S.) 30. Cp. *Powell v. Deveney*, 57 Mass. 300.

² *Lygo v. Newbold*, 9 Ex. 302, at 305.

³ *Singleton v. Eastern Counties Railway Company*, 7 C. B. N. S. 287. *Williams v. Great Western Railway*, L. R. 9 Ex. 157, is very similar to *Singleton’s* case; but here a neglect to fence on the part of the railway company was shewn, and the plaintiff was held entitled to recover. See also *Taylor v. Delaware and Hudson Canal Company*, 113 Pa. St. 162. Hagarty, C.J., in *Hurd v. Grand Trunk Railroad Company*, 15 Ont. App. 58, 66, expresses dissatisfaction with the decision in *Singleton’s* case.

⁴ L. R. 1 Ex. 239. A very similar Scotch case is *Campbell v. Ord*, 1 Rettie 149.

Hughes v.
Macfie.

A case cited in *Mangan v. Atterton* as an authority for the decision was *Hughes v. Macfie*¹—also a decision of the Court of Exchequer. The defendants placed the shutter of their cellar against the wall in a public street, and the dress of a child, who was playing in the street and jumping off the shutter, caught the corner of the shutter, which fell upon and injured him. It was ruled that the defendants were not liable to an action by the child, on the ground that an adult could have maintained no action, as he would have voluntarily meddled for no lawful purpose with that which, if left alone, would not have hurt him; and the fact of the plaintiff being of tender years made no difference.

Mangan v.
Atterton and
Hughes v.
Macfie con-
sidered.

These cases, then, broadly state a proposition that a child, when a trespasser, differs in no respect as to liability from an adult.

Yet in *Lynch v. Nurdin*² the plaintiff's improper conduct in mounting the cart was a trespass to the defendant's chattel; the decision was that the plaintiff could recover, on the ground that "he merely indulged the natural instinct of a child in amusing himself with the empty cart." "The child, acting without prudence or thought, has, however, shewn these qualities in as great a degree as he could be expected to possess them."

This is in accord with many American cases, in which a question has been left to the jury whether the conduct of an infant plaintiff in trespassing was the result of fault or negligence on his part, or whether it was the result of childish instinct and thoughtlessness.³ The caution required is according to the maturity and capacity of the child; and this is to be

¹ *Abbott v. Macfie*, 2 H. & C. 744. *Findlay v. Angus*, 14 Rettie 312, a Scotch case, is inconsistent with this. There a shutter fastened by a bolt was meddled with by children and fell, injuring one. The owner was held liable, though the Court were of opinion the protection afforded was enough "if not tampered with, in respect of any ordinary pressure that might be exerted," but, "having regard to the risks to which in the locality where it was, it was exposed," it was not enough. The mischievousness of children in a particular district and the absence of restraint on their proclivities seem somewhat peculiar grounds on which to raise a legal liability. Common sense reasserted itself in *Duff v. National Telephone Company*, 16 Rettie 675. There the owner of a two-wheeled barrow left it in a lane in a town. Two children began to play with it, and, whilst doing so, brought it down on, and fatally injured, a child of three years who was playing with them. The father of the child brought his action against the owner of the barrow, but it was dismissed on the ground that the father's negligence had contributed to the child's accident, and disentitled the father from suing. A remark of the Lord President (Inglist) may be noticed. He says "I do not intend to say that people are justified in leaving wheelbarrows in the public streets, but that was not the case here. The barrow was left in a narrow lane." The legal test of liability cannot be a question of the greater or lesser width of a highway in which a vehicle unattended is left; moreover, it is a common experience that in narrow lanes the swarming of children is greater than in wide streets.

² 1 Q. B. 29. In *Mann v. Ward*, 8 Times L. R. 699, Lord Esher, M.R., speaking of *Lynch v. Nurdin*, says "It has always been doubted."

³ *Birge v. Gardiner*, 19 Conn. 507, at 509, 512; *Daley v. Norwich and Worcester Railroad Company*, 26 Conn. 591, at 599.

determined in each case by the circumstances of the case,¹ and is for the jury. So, too, *Mangan v. Atterton* may be supported by considering that the instrument causing the injury was exposed for sale in a market-place, and it may well be that the exposure in such circumstances will not raise the presumption of negligence necessary to fix the defendant with liability. But the doctrines laid down by the Court go beyond this. Admitting negligence, says Martin, B., the negligence is too remote a cause of the mischief. And Bramwell, B., puts the case of the exposure of goods with a poisonous paint, or of a very delicate machine injured by the child's fingers, and regards the owner of the goods as an injured party if they are meddled with; and this on the hypothesis that negligence may be attributed to the defendant. This is an extension of the doctrine in *Weaver v. Ward*,² "no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*), except it may be judged *utterly without his fault*. As if a man by force take my hand and strike you, or if here the defendant had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances so as it had appeared to the Court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

It will be seen that one of the ingredients in *Weaver v. Ward* is that the defendant had committed no negligence to give occasion to the hurt. It is going beyond what is justified by that case to hold that an act is an actionable trespass although the negligence of the plaintiff partly contributed to it; since the last clause of the report is a special limitation to those cases "where the defendant had committed no negligence to give occasion to the hurt."

If the act of placing goods on a highway is negligent, the authority of *Weaver v. Ward* does not cover it; an extension must then be made of what is there laid down. Now, a highway is dedicated to the public with reference to the ordinary capacity of those traversing it to take care of themselves.³ No greater

¹ *Railroad Company v. Gladmon*, 15 Wall. (U. S.) 401; *Rauch v. Lloyd*, 31 Pa. St. 358.

² Hob. 134. In 35 H. VI. 11 pl. 18, it was said, per Moyle, J., that trespass lies against an infant though only four years of age. See Bro. Abr. Corone, pl. 6.

³ Little children have a right to go into the streets of a city for air and exercise, and if reasonable provision is made for their safety, are under the protection of the law against wrongdoers who disregard their rights. Whether the provision made for the care of the plaintiff was reasonable under the circumstances, and whether reasonable care was taken of him, must be left for a jury to determine: *Mulligan v. Curtis*, 100 Mass. 512, at 514. To the same effect is *Martin v. Ward*, 24 Sc. L. R. 586, where the Lord Justice-Clerk said: "I know of no case in which a child has been run over in a

obligation to care is imposed on people using a public highway than is incumbent on them in other ordinary relations of life; and it is well established, notwithstanding what was said in *Hughes v. Macfie*¹ and in *Mangan v. Atterton*,² that the conduct of an infant of tender years is not to be judged by the same rule as that of an adult.³ What would not be negligent in regard to adults may therefore be negligent with regard to young children; since greater precautions must be taken for their safety; and admitting that the placing a dangerous instrument on a highway may not be negligent with regard to adults, a different standard being adopted for young children, it does not follow that the same act may not be negligent where they are concerned. Again cases like *Bird v. Holbrook*⁴ go to shew that it is not every *trespass* even which disentitles the trespasser to recover for injuries received by him in trespassing. While *Clark v. Chambers*⁵ definitely lays down that a man who leaves in a public place along which persons, and amongst them children, have to pass a dangerous machine, which may be fatal to anyone who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character; and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion.⁶

Bramwell, B.'s,
judgment in
Mangan v.
Atterton
Considered.

We can now test the illustration with which Bramwell, B., supports his judgment in *Mangan v. Atterton*.² If young children are constantly going up and down in a street and are likely to suck paint, notwithstanding which, articles with poisonous paint are exposed in the street, it seems that those who sustain injury may recover, on the ground that such an act is the result of childish instinct and thoughtlessness. Again, with regard to the placing a delicate machine in a street, the person who puts it there will do so subject to the risk that it runs from the habits and manners of those using the street. If it be broken by a

public thoroughfare in which the defence has been successfully stated that the child had no business to be there and to get in the way of the vehicle."

¹ 2 H. & C. 744.

² L. R. 1 Ex. 239.

³ In addition to *Lynch v. Nurdin*, and the other authorities above cited, see the American cases, *Railroad Company v. Gladmon*, 15 Wall. (U.S.) 401, and *Railroad Company v. Stout*, 17 Wall. (U.S.) 657. Also *Jewson v. Gatti*, 2 Times L. R. 441 (C.A.); *Stiefsohn v. Brooke*, 5 Times L. R. 684.

⁴ 4 Bing. 628.

⁵ 3 Q. B. D. 327, at 339.

⁶ In *Lygo v. Newbold*, 9 Ex. 302, Alderson, B., says at 305: "It seems strange that a person who rides in his carriage without a servant, if a child receives an injury by getting up behind for the purpose of having a ride, should be liable for the injury." And Pollock, C. B., adds: "The case last put raises a doubt as to the authority of *Lynch v. Nurdin*." But in the case put there is no negligence on the part of the "person who rides in his carriage." If it were negligence to ride in a carriage without a servant, and the accident happened in consequence, the facts in *Lynch v. Nurdin* might be paralleled.

child not legally capable of negligence, the conduct of the proprietor in putting it in an exposed position will disentitle him to recover; although, if a child equally inexperienced were to do a similar injury where the other party was not chargeable with any default, an action would be maintainable on the grounds indicated in *Weaver v. Ward*.¹ In the former case an action for trespass is not maintainable, because the alleged trespass is the result of the owner's wrongful and negligent act, which is not condoned by an act in other circumstances amounting to a legal trespass. The act of the defendant if he is sued in trespass will be—like the case put in *Weaver v. Ward*,¹ “where the plaintiff ran across the piece when discharging”—not even a technical trespass by reason of the contributory act; for the injury will be caused by reason of negligently running counter to a natural and ordinary disposition, the operation of which should have been anticipated. The weight, then, both of authority and of reason seems to be Conclusion, against the legal doctrines propounded in *Mangan v. Atterton*; although, notwithstanding the remarks made in *Clarke v. Chambers*, it is nowhere definitely overruled, and on the facts may, as we have seen, be supported.

The case of *Bailey v. Neal*² is decided in accordance with the *Bailey v. Neal* principles we have enunciated. A heavy street roller with reversible shafts was left standing in a street, duly secured by a strong rope, which would have held it immovable. The plaintiff, a child of nine and a half, and another child meddled with it. The other child cut the rope, and plaintiff's fingers were crushed in the wheels of the reversible shaft. On the ground that the defendant had not been guilty of any negligence—the shaft having been secured—the plaintiff was nonsuited. Two propositions apparently were assumed—(1) that if the defendant had been negligent in leaving the roller, though the negligence was not the cause of the injury, the plaintiff could recover; (2) that contributory negligence of the plaintiff would not affect this right. A distinction seems to have been taken between leaving the roller on the highway in a negligent state—that is, with its shafts unfastened—and placing it there, unlawfully, in a safe condition. From the point of view that contributory negligence is not to be attributed to children in certain circumstances, it, at first sight, appears immaterial in what condition the machine was placed on the highway if its being there arose from negligence. This, however, is not so. It is one thing to impute liability when the intervening agency that sets the mischief at work is the mere ordinary thoughtlessness and ignorance of children, who may be

¹ Hob. 134.² 5 Times L. R. 20.

expected to play with an object like a roller left in their way; and it is quite another to contemplate the deliberate cutting of a strong rope—an act that is scarcely an ordinary and natural incident attendant on the neighbourhood of young children. The Scotch case of *McGregor v. Ross*¹ is very similar, though there no evidence was produced of how the rope which secured the machine was undone; it was assumed that, if not wilfully interfered with, the precautions taken were sufficient to render it harmless.

American
decisions.

The American decisions are by no means uniform. For example, in the case of *Railroad Company v. Stout*,² where a child of six years of age was injured through playing with a turn-table on the premises of the defendant railway company, the Supreme Court of the United States held that if the situation of the turn-table was such that children would probably resort to it, and if children had in fact resorted to it within the knowledge and observation of the officers of the company, there is a duty on the company to take precautions in the matter, the neglect of which exposed them to liability. Freedom from fault is not required of an infant.

On the other hand, in Connecticut, in the elaborately argued case of *Nolan v. New York Railroad Company*³ another view is presented. A child of seven was attracted on a railway line by something he saw. The State Court held the age of the child injured ineffectual to raise a duty where none otherwise existed. With regard to duties to the public at large, children, women, and men are upon the same footing. Precautionary measures having for their object the protection of the public, must, as a rule, have reference to all classes alike; though there are duties to infants where a different degree of care is requisite than is due to adults.

Weight of
authority.

The true view is expressed by Henry, C.J., in *Schmidt v. Kansas City Distilling Company*.⁴ An owner of property must

¹ 10 Rottie 725. In *Slade v. The Victorian Railway Commissioners*, 15 Vict. L. R. 190, there was the additional factor that the injured boy was a licensee on defendant's pier. But it was rightly decided this made no difference in the principle applicable.

² 17 Wall. (U.S.) 657. As to this case, in *Frost v. Eastern Railroad*, 10 Am. St. R. 396, 64 N. H. 220, Clark, J., very sensibly says: "We are not prepared to adopt the doctrine . . . that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. The owner is not an insurer of the safety of infant trespassers. One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit tree bound to cut it down or inclose it or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit." *Reary v. Louisville Railroad Company*, 40 La. An. 32, 8 Am. St. R. 497. On the same point *Rodgers v. Lees*, 140 Pa. St. 475, 23 Am. St. R. 250 may be consulted.

³ 53 Conn. 461.

⁴ 59 Am. R. 16; there is an exhaustive note to this case, at 23.

not place temptations upon it to allure any one to a dangerous place upon his premises, nor yet place dangerous things so near a public street or highway as to endanger persons thereon; and the fact that young children are in the habit of resorting to the neighbourhood is an element in determining what is alluring,¹ and what safeguards should be adopted. This doctrine is approved by the Court of Appeal in *Jewson v. Gatti*.² There "a little girl" was leaning against a railing, looking into a cellar where workmen were engaged in scene-painting, when the rail gave way and she fell into the area and was injured. An action being brought, the plaintiff was nonsuited, but the Divisional Court, affirmed by the Court of Appeal, set the nonsuit aside and ordered a new trial, Lord Esher, M.R., saying: "There was painting going on in the cellar, and it must have been known that this would attract children; and then a bar was put up, ostensibly for the purpose of protection, against which children would naturally lean while looking down into the cellar where the painting was going on. That was almost an invitation, certainly an inducement, to the children to lean against the bar while looking down into the cellar."

*Jewson v.
Gatti.*

Though a sound principle, there is often difficulty in its application; for example, in *Klix v. Nieman*,³ a child fell into an unfenced pond, which was found to be dangerous to the lives of children living in the neighbourhood and who might be attracted thereto for amusement or otherwise. The Court, however, negatived any duty to fence, on the authority of *Hardcastle v. South Yorkshire Railway Company*⁴ and *Hounsell v. Smyth*; ⁵ and no other decision appears tenable.⁶ A possible principle is that the duty to children and adults is substantially the same, only that,

*Klix v.
Nieman.*

¹ An allurement seems to be some attraction added to land, not the mere effect of land in its natural state: *Evansville Railroad Company v. Griffin*, 50 Am. R. 783.

² 2 Times L. R. 441; in the Div. Court, at 381. *Stiefsohn v. Brooke*, 5 Times L. R. 684, per Fry, L.J.; Cp. *Findlay v. Angus*, 14 Rettie 312, *ante* 184. The same principle, with regard to alluring children, is laid down in America in what are known as the turntable cases: *Haesley v. Winona Railroad Company*, 24 Am. St. R. 220.

³ 60 Am. R. 854. *Ross v. Keith*, 16 Rettie 86, is similar; only these children had to pass along a private road to get to the pond; and the negligence alleged was leaving the gate of the private road open. In *Royan v. M'Lennans*, 17 Rettie 103, Lord Young distinguishes the case of the child of a "farm servant who had a house on the farm not far from the place at which the child was drowned." Unless the pond is made subsequently to the farm servant's engagement, in English law, at least, there seems to be no ground for the distinction. If *M'Feat v. Rankin's Trustees*, 6 Rettie 1043, is an authority the distinction may exist in Scotland, however opposed to principle it may be. As to *M'Feat's* case, see *post*, Duty of Occupiers of Property. See also *Gibson v. Glasgow Police Commissioners*, 20 Rettie 466, and *Hamilton v. Hermand Oil Company*, 20 Rettie 995, perhaps out of Scotland a more than doubtful decision.

⁴ 4 H. & N. 67.

⁵ 7 C. B. N. S. 731.

⁶ But see *Haughton v. North British Railway Company*, 20 Rettie 113.

in the case of children, trespassers allured by some attraction¹ are allowed wider limits of deviation than in the case of adults. In *Klix v. Nieman* the decision might have been supported on the ground that from all that appeared the land was in its natural condition.

Extent of the protection of infants.

The next inquiry is to what extent this special protection of infants goes. There does not appear to be any definite English rule. In America the subject is discussed in *Nagle v. Allegheny Valley Railroad Company*;² it was conceded that if the boy for whose death damages were sought, and who was between fourteen and fifteen, were regarded as an adult, he had been guilty of rashness, which would have defeated the action. But the contention was his tender years rendered him not responsible for negligence. The Court refused to leave this to a jury, saying:

Rule laid down in *Nagle v. Allegheny Valley Railroad Company*.

"It would give us a mere shifting standard, affected by the sympathies or prejudices of the jury in each particular case. One jury would fix the period of responsibility at fourteen, another at twenty or twenty-one. This is not a question of fact for the jury. It is a question of law for the Court; nor is its solution difficult. The rights, duties, and responsibilities of infants are clearly defined by the text-writers, as well as by numerous decisions. Upon so plain a question it is sufficient to refer to Sharswood's *Blackstone*, vol. i. p. 435, 464; *Id.* iv., p. 20, where we learn that fourteen is the age of discretion in males, and twelve in females; that at fourteen an infant may choose a guardian, and contract a lawful marriage. His responsibility to the criminal law is equally well settled. Under seven years of age an infant cannot be guilty of felony, for then a felonious discretion is almost an impossibility in nature. But at eight years old he may be guilty of felony: *Dalt. Inst.*, ch. 147. Between the ages of seven and fourteen, though an infant shall be *prima facie* adjudged to be *doli incapax*, yet if it appears to the Court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death; after fourteen an infant is responsible for his crime to the same extent as an adult. We have thus seen that the law presumes that at fourteen years of age an infant has sufficient discretion and understanding to select a guardian and contract a marriage; is capable of harbouring malice and of taking human life under circumstances that constitute the offence murder. It therefore requires no strain to hold that at fourteen an infant is presumed to have sufficient capacity and understanding to be sensible of danger, and to have

¹ See per Cockburn, C.J., *Corby v. Hill*, 4 C. B. N. S. 556, at 562.

² 88 Pa. St. 35, at 39.

the power to avoid it. And this presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years of age."

In accordance with this view, and on the authority of it, the law under the code in Georgia has been succinctly stated in *Rhodes v. Georgia Railroad Company*:¹

(1) *Prima facie* an infant under the age of ten years has not sufficient capacity to be sensible of danger or to have the power to avoid it; and this presumption will continue until overcome by proof shewing the contrary.²

(2) An infant of the age of fourteen years is presumed to have sufficient capacity to be sensible of danger, and to have power to avoid it, and this presumption will stand till overthrown by clear proof of the absence of such discretion.

(3) An infant between the age of ten and fourteen years must be shewn to have capacity, in the particular instance, to understand and avoid danger.

The measure of responsibility varies with each additional year. It makes no sudden leap at the age of fourteen. That is simply the convenient point at which the law, founded upon experience, changes the presumption of capacity, and puts upon the infant the burden of shewing his personal want of the intelligence, prudence, foresight, or strength usual in those of such age.³

A modern Scotch case⁴ seems to countenance the imposition of a similar test of age: though in that case a "child" was defined by the Factory and Workshop Act, 1878,⁵ s. 11, "to mean a person under the age of fourteen," and reference to the general law was unnecessary. On the other hand, in *Grizzle v. Frost*,⁶ the "young person" injured was sixteen years of age. The work she was set to was in connection with dangerous machinery, with the use of which she was quite inexperienced, and as to which there were statutory restrictions on employment. It is to be

Rule in *Rhodes v. Georgia Railroad Company*.

Tendency of the Scotch Courts.

Grizzle v. Frost.

¹ 20 Am. St. R. 362. "Ten years" seems to have been substituted for "seven" by § 4295.

² In *Gibson v. Glasgow Police Commissioners*, 20 Rettie 466, the Scotch judges in the Court of Session considered the law in an unsettled condition as to whether a child at five can be guilty of contributory negligence.

³ *Kehler v. Schwenk*, 144 Pa. St. 348, 27 Am. St. R. 633.

⁴ *Sharp v. Packhead Spinning Company*, 12 Rettie 574. In *Carty v. Nickoll*, 6 Rettie 194, a different rule was applied; but there what amounted to a statutory authorization to do the work was urged; secondly, the point of non-accountability was not taken; and thirdly, the sheriff-substitute found contributory negligence as a fact. In *Grant v. Caledonian Railway Company*, 9 Macph. 258, it was decided that a child of six may contribute by negligence to an injury to itself; while in *M'Gregor v. Ross*, 10 Rettie 725, a child of four was held not capable of contributing.

⁵ 41 Vict. c. 16, §§ 11, 12, 26, 96.

⁶ 3 F. & F. 622, at *Nisi Prius*, before Cockburn, C.J.

borne in mind, then, that knowledge of dangerous machinery requires greater intelligence than mere knowledge how to avoid ordinary dangers; and the character of the particular work rebuts the presumption of capacity to avoid the dangers of it.

Summing up
of the cases.

There is, then, a graduated scale. If the child engaged in work, from which injury happens, is so young that it cannot know the character of contributory negligence, as matter of law, it can recover, whenever the defendant is in default in the observance of due care and caution; if the child can understand, it is for the jury to say, in the ascending scale of age and imputability, whether any particular act which may be negligent—and would be looked at as negligent if done by an adult—is negligent.

In the case of young people working at dangerous machinery, greater consideration is shewn in proportion to the greater risk of the work; and a jury may find that, through immaturity of judgment, they are exposed to risks beyond the measure of their capacity to appreciate.

Crocker v.
Banks.

This is the ground of the decision of the Court of Appeal in *Crocker v. Banks*,¹ where a girl of seventeen, in the employment of a soda-water manufacturer, was injured by the bursting of a soda-water bottle, which she was engaged at a machine in filling. The machine had an automatic guard during the period of filling and corking the bottles; so soon as it became necessary to take the bottle from the machine, the guard dropped. Masks were provided for use at this time, but the plaintiff did not put hers on, and in consequence was injured. The question was, whether she was guilty of contributory negligence. She had sworn at the trial that she did not know the danger, or that it was necessary to wear the mask at that particular period. The Court of Appeal² based their opinion on her statement, and held that “it was not negligence *for a girl of her age* to omit to put on the mask if she did not know that she was bound to do so at that period of the operation.”³

(ii.) Where the
negligence is
that of those
in charge of
the child.

Waite v.
North-Eastern
Railway
Company.

Secondly, where the persons having charge of a child have negligently placed the child or permitted it to be in a position in which it sustained injury.

The leading case is *Waite v. North-Eastern Railway Company*, in the Exchequer Chamber.⁴ This was an action on behalf of an infant by his next friend. The infant, which was five years of

¹ 4 Times L. R. 324 (C. A.)

² Per Lord Esher, M.R., at 325.

³ The Scotch Courts take the same general view, but apparently are not inclined to be so liberal as the English Court of Appeal: *Forbes v. Aberdeen Harbour Commissioners*, 15 Rettie 323. See, too, *McIntyre v. Buchanan*, 14 Up. Can. Q. B. 581.

⁴ E. B. & E. 719.

age, was with its grandmother, who took a half-ticket for the child and a ticket for herself to travel by the defendants' line; as they were crossing the railway the child was injured by a passing train. The jury found that the defendants were guilty of negligence, and that the grandmother was guilty of negligence, which contributed to the accident, while there was no negligence on the part of the infant plaintiff. A verdict was entered for the plaintiff, with leave to move. In the Queen's Bench, the verdict was entered for the defendants, without calling on them to argue, on the ground that the infant was identified with its grandmother.

In the Exchequer Chamber, Cockburn, C.J., thus stated the governing principle of the decision:¹ "When a child of such tender and imbecile age is brought to a railway station, or to any conveyance, for the purpose of being conveyed, and is wholly unable to take care of itself, the contract of conveyance is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge. Such care not being used, where the child has no natural capacity to judge of the surrounding circumstances, a child might get into serious danger from a state of things which would produce no disastrous consequences to an adult capable of taking care of himself." Lindley, L.J., subsequently² thus more tersely expressed the decision: "The defendants had a right to expect that proper care would be taken of the child, and if such care had been taken, there would have been no accident." The child further had a right to expect that the company should not be guilty of negligence, even though the contract brought him on the premises;³ and had the company's violation of this duty been the cause of the accident there is no reason why the fact that the injured person was in charge of any one else, or was on the premises in pursuance of the terms of a contract, should lessen the consequence to the railway of their own negligence. On the other hand, if the company's negligence was merely a condition, and not the cause of the injury, then on general principles it is apparent they would not be liable in any case and quite irrespective of any question of identification.

Cockburn, C.J.'s judgment in the Exchequer Chamber.

The fact according to Lindley, L.J., seems to be that it was not the lack of care on the part of the railway that caused the accident, but the lack of care on the part of the grandmother; for "if such care had been taken there would have been no accident." The decision, therefore, goes no further than to hold

Case considered.

¹ 1 E. B. E. 728, at 733.

² The Bernina (2), 12 P. Div. 58 at 92.

³ "There would be that duty which the law imposes on all, namely, to do no act to injure another," per Bramwell, L.J., *Foulkes v. Metropolitan District Company*, 5 C. P. Div. 157, at 159.

that where a railway company would not be liable for an accident to an adult, their liability is not increased because the person injured is a helpless child, and the immediately preceding negligence is that of the child's keeper. But this explanation is too vague to be satisfactory; and besides does not accord with many expressions in the judgments. We must accordingly take a closer view of the facts. The alleged negligence of the railway company was in not notifying to the grandmother, at the time she took her ticket, or subsequently, the danger of crossing the line. The negligence of the grandmother was in not taking sufficient caution in crossing. Thus, if there had not been any contract in the case, the grandmother and the child would have been mere licensees, if not actual trespassers. They would have been on the line with, at the utmost, the permission of the company, who would not undertake any duty to them further than that of not increasing the risks to which they were exposed by the ordinary conduct of the company's business.¹ If, then, they were either trespassers or licensees, the railway company would not have been in default; for there was no negligence alleged in the running of the train. So that the only duty violated was a contractual one; and the contract, as Lord Campbell points out,² was that in consideration of the grandmother taking ordinary care of the child the company would undertake to convey him. But the grandmother broke the contract in such circumstances as to discharge the company; while the circumstances raised no duty apart from contract. If this is the right view of the case the head-note is not accurate. Moreover, it is plain from Lord Campbell's judgment the negligence was not joint but successive. If these conclusions, or either of them, are accurate, very much of the criticism on this case is beside the point, and it is no authority for the proposition for which it is most often vouched.

*Burchell v.
Hickisson.*

Burchell v. Hickisson,³ has points of similarity with *Waite's* case. The plaintiff, a boy of four years old, went with his sister to defendant's house. A few steps, protected on either side by railings, led up to the front door. One of the rails at the topmost step had been for some time broken away, leaving a gap, across which ropes had been interlaced but had worn away. The plaintiff was told to stop, at the bottom of the steps, while the sister went in the house. He, however, came up the steps, and falling through the gap into the area below, was injured. Lindley and Lopes, J.J., held that the plaintiff could not recover, on the ground

¹ *Gautret v. Egerton*, L. R. 2 C. P. 371; cp. *Batchelor v. Fortescue*, 11 Q. B. Div. 474.

² E. B. & E. 719, at 727.

³ 50 L. J. Q. B. 101.

that defendant never invited such a person as the plaintiff to come unless he was taken care of ; and if he was in charge of others, there was no concealed danger—that is, there was no duty from the defendant to the plaintiff which had been violated, and consequently no negligence.¹ The distinction between this case and *Lay v. Midland Railway Company*² is that in *Lay v. Midland Railway Company* the bridge, which was found by the jury to be dangerous, was for use by the public, and the plaintiff had consequently a right to be there ; while in the present case the plaintiff had no right to be where he was when he met with the accident. Had the gap been in the railings abutting on the street, the decision must have been different.³

A word must be added as to joint negligence. In *Abbot v. Macfie*,⁴ the Court said : “ If he [the plaintiff] was playing with Hughes so as to be a joint actor with him, he cannot maintain this action. If not, we think he can, as his injuries would then be the result of the joint negligence of Hughes and the defendants.” It is clear that if the negligence were the joint negligence of Hughes and the defendant, and the plaintiff was free from negligence, the plaintiff could recover against both, or either. But assuming that the defendant was guilty of negligence, and plaintiff and Hughes were playing together, the right of the plaintiff to maintain an action must depend upon establishing the proposition—that contributory conduct of an infant has the same effect as it has in the case of an adult ; and upon the determination of the question whether the intervening agents prevented the result that followed being reasonably and probably foreseen as likely to arise out of the negligent act by a person of average intelligence.

The cases hitherto examined are cases where the child is said to be under the control of an older person at the time of the happening of the accident ; or, may be, injured in circumstances

¹ There is no legal obligation to fence an excavation, unless it be so near a public road as to constitute a public nuisance : *Hounsell v. Smyth*, 7 C. B. N. S. 731 ; *Hardcastle v. South Yorkshire Railway Company*, 4 H. & N. 67. See *ante*, 189, as to where there is an allurement.

² 34 L. T. 30.

³ In America it was held that where a child of seven was out walking with his father, and, stepping aside to clasp in sport a post forming part of a bridge they were crossing, fell through a hole in the planking into the water and was drowned, there was no evidence of contributory negligence. *Gulline v. Lowell*, 144 Mass. 491 ; also note to 59 Am. R. 104. On the general question whether, assuming contributory negligence of a parent, an infant is barred, there is considerable difference of opinion. The Pennsylvanian Courts answer it in the negative, *Smith v. O'Connor*, 58 Pa. St. 218 ; *Erie, City, &c., Company v. Schuster*, 113 Pa. St. 412 ; 57 Am. R. 471, and note 474. So too in *Bellefontaine, &c., Railroad Company v. Snyder*, 18 Ohio St. 399, at 408, and *post*, 200 *et seqq.* On the other hand, see *Fitzgerald v. St. Paul, &c., Railroad Company*, 43 Am. R. 212, and note 216.

⁴ 2 H. & C. 744. *Hughes v. Macfie*, *id.*

where no duty had been violated by the defendant. There remains the case where the absence of control is the cause of the child sustaining injury.

The only reported English case on the point is at *Nisi Prius*.¹ Defendant was driving, when the plaintiff, aged three years and a quarter, ran out into the road, was knocked down, and run over. Channell, B., said, "The doctrine of contributory negligence does not apply to an infant of tender age. To disentitle the plaintiff to recover it must be shown that the injury was occasioned entirely by his own negligence."

The point that there was any such duty on the parent, the neglect of which would disentitle the infant to recover, does not seem to have been taken; and there does not appear to be any reported English case in which it has been mooted.²

American cases.

There is a multitude of American cases on this subject, and the doctrines laid down by them very materially vary.

Personal chargeability of infant with negligence of its guardian.

It is held in New York, Massachusetts, Indiana, and perhaps Illinois, that an infant is personally chargeable with negligence, or fault of its guardian, whereby it is exposed to injury.³

Contrary view "Vermont rule." Judgment in Robinson v. Cone.

On the other hand, in a widely cited case⁴ which establishes what is known in America as "the Vermont rule," the principle is laid down that "although a child or idiot or lunatic may, to some extent, have escaped into the highway through the fault or negligence of his keeper, and so be *improperly* there, yet, if he is hurt by the negligence of the defendant, he is not precluded from his redress. If one knows that such a person is in the highway, or on a railway, he is bound to a proportionate degree of watchfulness, and what would be but *ordinary* neglect in

¹ Gardner v. Grace (1858), 1 F. & F. 359. This case was several years before Mangan v. Atterton, L. R. 1 Ex. 239.

² In Martin v. Ward (1887), 14 Rettie 814, the point was taken in Scotland, where two children aged three and five respectively, were run over, the driver being negligent. In an action by the father it was contended that his negligence contributed to the accident by allowing such young children to be in a place of danger without some one in charge of them. This was held not to shew any defence. See, however, Duff v. National Telephone Company, 16 Rettie 675, at 676, per the Lord President.

³ The leading case for this view is Hartfield v. Roper, 21 Wend. (N. Y.) 615. See also Weil v. Dry Dock, &c., Railroad Company, 119 N. Y. 147; Birkett v. Knickerbocker Ice Company, 110 N. Y. 504, where it was held not negligence as matter of law for the parents of a child four and a half years old to permit it "with proper instruction and directions against going into the street to play upon the sidewalk without an attendant." Casey v. Smith, 152 Mass. 294; Leslie v. City of Lewiston, 62 Me. 468. In a New York case, Moebus v. Herrmann, 108 N. Y. 349, where a child under seven years of age was run over, the direction given was: "The rule of vigilance applies to children as well as to adults, but a child of immature years, whilst bound to exercise care, is held to no higher degree of forethought than you would expect of its age." "If you say that the child did what an ordinarily careful child would have done, then it is not negligence;" and "if the boy failed to adopt the means known to him to be effective in protecting him against danger, and was injured thereby, the plaintiff cannot recover." This was sustained by the Court. See, too, Collins v. South Boston Railroad Company, 142 Mass. 301; and *post*, 201, n. 2, 203, n. 1.

⁴ Robinson v. Cone, 22 Vt. 213.

regard to one whom the defendant supposed a person of full age and capacity, would be gross neglect as to a child or one known to be incapable of escaping danger." The expression "ordinary neglect" here used appears inaccurate in this connection, since proof of an absence of ordinary diligence on a highway would be sufficient to charge the negligent person. What was probably meant is that conduct, or want of care, not actionable where an adult is concerned, may yet be actionable when a young child is injured thereby. Thus interpreted the decision seems to be good sense, and is approved and developed in a late new Jersey case,¹ where the Court says: "The law, natural and civil, puts the infant under the care of the adult, but how can this right to care for and protect be construed into a right to waive, or forfeit, any of the legal rights of the infant? The capacity to make such waiver or forfeiture is not a necessary, or even convenient, incident of this office of the adult, but on the contrary is quite inconsistent with it, for the power to protect is the opposite of the power to harm, either by act or omission." Having stated the assumed theory of law to be that the custodian of the infant is the agent of the infant, the judgment continues: "Such custodian cannot surrender or impair a single right of any kind that is vested in the child nor impose any legal burden upon it." "In the language of an ancient authority this doctrine is thus expressed. 'The common principle is, that an infant in all things which sound in his benefit shall have favour and preferment in law, as well as another man, but shall not be prejudiced by anything to his disadvantage' (9 Vin. Abr. 374).² And it would appear to be plain that nothing could be more to the prejudice of an infant than to convert by construction of law the connection between himself and his custodian into an agency to which the harsh rule of *Respondeat superior* should be applicable." . . . "The sensible and legal doctrine is this—an infant of tender years cannot be charged with negligence, nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent, the consequence being that he can, in no case, be considered to be the blameable cause either in whole or in part of his own injury. There is no injustice nor hardship in requiring all wrongdoers to be answerable to a person who is incapable either of self-protection or of being a participator in their misfeasance." Whatever the ultimate course taken by the English Courts, there can be no doubt this view has the merit both of common sense and humanity.

Newman v.
Phillipsburg
Horse Car
Railroad
Company.

¹ (1890) *Newman v. Phillipsburg Horse Car Railroad Company*, 52 N. J. Law 446. The judgment is printed in a note to Jones, *Negligence of Municipal Corporations*, § 215.

² *Enfant* (A. 2).

Father assenting to infant son's employment at dangerous work not entitled to recover for injury to him.

There is a Pennsylvanian decision¹ holding that where a father knew of his son's employment at dangerous work and allowed him to remain without objection, the father is chargeable with contributory negligence and is not entitled to recover. In this case it must be remembered that the action is by the father;² even with this fact in view the decision is difficult to follow, having regard to the language of the report:³ "There was testimony from which it was claimed that the car-track was not in proper condition, that the appliances in use for detaching the mule from the car were unsafe and essentially unlike those in use at some other collieries in the vicinity." In the event of the jury finding defective condition of the plant it seems an extreme position to take up, that the possible previous negligence of the parent should disentitle him to recover. In England at least there are other vital objections to the validity of this decision, since the judgment of the House of Lords in *Smith v. Baker*,⁴ which will be apparent to any one referring to and continuing the quotation just made.

In the law of Scotland, with which that of England coincides, the rule on this point of antecedent or preliminary negligence⁵ has been succinctly stated by Lord Young: "A labourer is not to be blamed, or barred from recovering damages for injuries sustained by him through his employer's fault because he had not provided against a possible defect in his employer's machinery or tackle of which he could not be expected to be aware." One engaged in work, or authorizing the engagement of another in work, clearly does not in law or in fact *prima facie* undertake the risk of any negligence whatever in addition to the intrinsic and necessary perils of the work undertaken.⁶

¹ *Schwenk v. Kehler*, 122 Pa. St. 67; 9 Am. St. R. 70. Cp. *Hemmingway v. Chicago, &c., Railroad Company*, 7 Am. St. R. 823, as to the duty of a railway company to an infant passenger; and the negligence of a parent.

² In *Pratt Coal and Iron Company v. Brawley*, 3 Am. St. R. 751, where an action was brought on behalf of a child, contributory negligence of the father was held no defence; but otherwise where the father sued on his own behalf. In the latter case negligence of the custodian appointed by the father is negligence of the father.

³ 122 Pa. St. at 68.

⁴ (1891) App. Cas. 325.

⁵ *Rooney v. Allans* (1883), 10 Rettie 1224, at 1228.

⁶ A question that often arises may be here noted, viz., Can the medical or surgical expenses of a child that is injured by an accident, be recovered as part of the damages in an action brought by the father as next friend of the child? The contract with the medical man is most usually with the father. Sums paid by the father are not necessarily, nor ordinarily, damages recoverable by the child. The jury have, of course, a liberal limit for the assessment of damages in accident cases; but where there is no jury the judge may have to decide what damages are *legally* recoverable. If then the medical expenses are alleged to be incurred by the father on his contract, they are as such not recoverable. But medical attendance is a necessary for which the child may contract. (Co. Litt. 172 a, § 259), "If an infant is wounded, an action will lie on his promise to the surgeon," *Pickering v. Gunning Palmer*, 528; *Keane v. Boycott*, 2 H. Bl. 512. A contract with the child might thus in some cases be alleged; or a contract with the

To return, however, to our immediate subject, the position of young children with regard to their disability to recover by reason of their own or their guardians' contributory negligence. It is a sound principle that since young children are not capable of contributory negligence in the sense in which adult persons are, the duty of adults towards them should be commensurate with their own feebleness and inability to safeguard themselves. There is no injustice in requiring people in their dealings with young children to avoid being negligent at all; and in fixing them with liability if they are negligent, notwithstanding that the children's own negligence contribute to the injury.¹ Principle discussed.

A person negligently flings a fire-brand; it may fall harmless; then, though the act is wrongful, there is no damage; if it fall into a basket of hay and ignite it, the measure of damage is the value of the hay, which is inconsiderable; but if the brand fall among valuable silks and satins and ignite them, the measure of damage is the value of the goods destroyed. In this case the same act done in the same circumstances may incur very different consequences. There seems no valid reason why an act of negligence, without legal consequences when affecting one class of the community, should not bear a very different aspect when done with regard to another.

A child has independent legal rights even against its father or guardian, in cases where the property of the child is injured.² It would seem contrary to principle, then, that, where the child receives a personal injury, the negligence of the father could be set up as a bar to recovery. A distinction may, however, be drawn between injuries resulting from the parent negligently

father, as agent for the child, in a contract for necessaries. An infant can authorize an agent to do any act for his benefit, Story, Agency, § 6. 31 & 32 Vict. c. 122, s. 37, only applies to a criminal liability where the father does not obtain medical assistance for his child. *The Queen v. Downes*, 1 Q. B. D. 25; *The Queen v. Morby*, 8 Q. B. D. 571. If the infant live with the father, who provides him with the necessaries of life, it is true he cannot contract, *Bainbridge v. Pickering*, 2 Wm. Bl. 1322. Yet if the father do not provide the necessaries, then the child can contract for them; and if he do not live with the father, he can; and if he can, there does not seem any objection in law to the child having the father as his agent for his benefit, as well as any other person with a less interest in the agency. Again, if the child has separate estate, and the father is guardian, a contract might be presumed with reference to that estate made by the father as agent for the child. Any difficulty, however, may be avoided by joining a claim by the father for the expenses on the writ, with the claim for damages on the part of the child, or by an amendment to the same effect.

¹ A good instance of a child too young to be responsible for contributory negligence held disentitled to recover against a railway company by reason of the railway company's freedom from negligence, is to be found in *McMullen v. Pennsylvania Railroad Company*, 19 Am. St. R. 591. Cp. the Scotch cases, *Grant v. Caledonian Railway Company*, 9 Macph. 258; *Morran v. Waddell*, 11 Rettie 44; *Haughton v. North British Railway Company*, 20 Rettie 113. Also *ante*, 190.

² 9 Vin. Abr. *Enfant* (H. 6), Actions. How they must be sued: *Morgan v. Morgan*, 1 Atkyna, 489.

omitting and negligently committing certain acts. It has been said that the parent is, by common law, under no legal obligation, as contradistinguished from a moral obligation, to safeguard his child. Assuming this to be so (which by the way would involve a very strong argument against the doctrine of identification) there are yet cases where the parent's actual negligence causes injury to the child, and where no legal principle denies the child's right of action by his next friend. The parent is guilty of negligence if the child is injured by the joint negligence of the parent and a third person. If the negligence had been joint negligence of persons unconnected with the child, the child could maintain an action against both or either of the wrongdoers.¹

Rights against
joint tres-
passers.

English and
American
decisions in
conflict.

Scotch view.

Signification of
*transit in rem
judicatam*.

¹ *Burrows v. March Gas Company*, L. R. 5 Ex. 67, at 71. For a joint trespass a plaintiff may sue all the trespassers jointly or each of them separately, and each is liable for the act of all, Co. Litt. § 376, 232a; *Cabell v. Vaughan*, 1 Wms. Saund. 290 *et seq.*; *Sutton v. Clarke*, 6 Taunt. 29. Where two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other; because both are equally culpable or *participes criminis* and the damage results from their joint offence. This rule does not apply when one does the act or creates the nuisance, and the other, though not joining therein, is yet exposed to liability and suffers damage. Such a person may recover against him, whose wrongful act has exposed him to pay damages, an indemnity for what he has had to pay, *Gray v. Boston Gas Light Company*, 114 Mass. 149, 19 Am. R. 324. The right to indemnity stands upon the principle that every one is responsible for the consequences of his own negligence, and if another person has been compelled (by the judgment of a court having jurisdiction) to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him, *Oceanic Steam Navigation Company v. Compania Transatlantica Española*, 134 N. Y. 461, 30 Am. St. R. 685. On the point whether, where plaintiff has gone against one and recovered, he can subsequently proceed against another, American and English decisions have diverged. In America, in *Livingston v. Bishop*, 1 Johns. (N. Y. Sup. C.) 290, after a minute examination of the earlier English cases, and professing to decide in accordance with Sir John Heydon's case, 11 Co. R. 5a, Kent, C.J., laid down the rule to be "that where you elect to bring separate actions for a joint trespass, you may have separate recoveries and but one satisfaction; and that the plaintiff may elect *de melioribus damnis*, and issue his execution accordingly; and that where he has made his election, he is concluded by it, and that if he should afterwards proceed against the other defendants, they shall be relieved on payment of their costs." This view was sustained in the Supreme Court of the United States, in *Lovejoy v. Murray*, 3 Wall. (U. S.) 1, at 10, where, the later English cases to the contrary, *King v. Hoare*, 13 M. & W. 494 (see also a consideration of this case in *Law Mag. N.S.*, vol. iii. (1845), 138), and *Buckland v. Johnson*, 15 C. B., 145, were considered. The English Exchequer Chamber, however, in *Brinsmead v. Harrison*, L. R. 7 C. P. 547, followed *King v. Hoare*, 13 M. & W. 494 and *Comyns, C.B.*, Dig. Action, K. 4, in regarding *Brown v. Wootton*, Cro. Jac. 73, Yelv. 67 *sub nom.* *Broome v. Wootton*, as "a satisfactory and binding authority," and held that a judgment in an action against one of two joint tortfeasors is a bar to an action against the other for the same cause. See also *Ex parte Drake*, *In re Ware*, 5 Ch. D. 866; *Edevain v. Cohen*, 41 Ch. D. 563-43 Ch. Div. 187. The American view is fully presented in *Couley*, Torts, 2nd ed. 152-162. As to joint and separate liability in the law of Scotland, see the statement of the Lord Justice-Clerk in *Liquidators of Western Bank of Scotland v. Douglas*, 22 Dunlop 447, at 476. In the law of England there is a limitation to be borne in mind which is thus expressed by Lord Ellenborough, C.J., in *Drake v. Mitchell*, 3 East 251, at 258: "I have always understood the principle of *transit in rem judicatam*, to relate only to the particular cause of action in which the judgment is recovered, operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it is made productive in satisfaction to the party; and therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have." *Drake v. Mitchell* is distinguished in *Cambefort v. Chapman*, 19 Q. B. D. 229, see especially per Manisty, J., at 234, which is dissented from *Wegg-Prosser v. Evans* (1894), 2 Q. B. 101. In *Windsor and Annapolis Railroad Company v. The Queen*, 10 Can. S. C. R. 335, at 390 *et seqq.* Fournier J., considers the authorities in the French law, which

There seems no reason then why the parent's negligence should exonerate from the consequences that would otherwise follow, except on the consideration that the duty of the parent not to be negligent is—morally—greater than in an ordinary case.

The case of *Waite v. North-Eastern Railway Company*¹ is not an authority to the contrary; for that case was decided in the exclusive reference to contract, and is to be supported on the ground of the contract that was there made. In the ordinary case of a young child playing in the street, where, according to an American decision,² young children have a right to be for air and exercise, no question of contract intervenes. The case suggested by Lord Campbell, C.J., in the Queen's Bench, in *Waite v. North-Eastern Railway Company*, of a baby only a few days old, carried in the nurse's arms, and injured through negligence, to which the nurse had contributed, seems to raise all the difficulties of an extreme statement of the facts that should import liability.

Waite's case distinguished.

he says are in accord with the rule stated by Lord Ellenborough in *Drake v. Mitchell*, that a judgment recovered in any form of action, is still but a security for the original cause of action until it be made productive in satisfaction to the party; and therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have. See also per Henry, J., at 411. The same has been held in Ireland: *Wakefield v. Smythe*, 16 Ir. C. L. R. 173. Bruce, J., has held (Chancellor *v. Webster*, 9 Times L. R. 568) a distress illegal after judgment for the rent which remained unsatisfied. The premises were held under a lease. Lord Ellenborough's *dictum* in *Drake v. Mitchell*, and the adoption of it in *Vestry of Bernondsey v. Ramsey*, L. R. 6 C. P. 247, 251, and *In re Davison*, 13 Q. B. D. 50, do not appear to have been cited. In 2 Kent Comm. (12 ed.) 389, the conclusion is reached that a judgment in *trover*, without satisfaction, does not vest the property in the goods in the defendant, though there is much confusion and conflict in the cases. The principle approved is that property does not pass by the judgment but only by satisfaction of the judgment. See also 3 Kent Comm. 31 n. (a) 32. In *Bantleon v. Smith*, 2 Binney 146, it is distinctly held that, in Pennsylvania, judgment in debt for rent without satisfaction does not take away the remedy by distress. For the effect of having levied a distress, which is still in distrainer's hands unsold, on the right to bring an action on the covenant, see *Lehain v. Philpott*, L. R. 10 Ex. 242. A covenant not to sue one of a number of joint tortfeasors does not release the others from liability. *Duck v. Mayeu* (1892), 2 Q. B. 511. The rule in the civil law is *si duo dolo malo fecerint invicem de dolo non agent*, D. 4, 3, 36. This was adopted by the Court of Chancery. "Where the liability," says Lord Cottenham, in *Attorney-General v. Wilson*, 1 Cr. and P. 1, at 28, "arises from the wrongful act of the parties, each is liable for all the consequences, and there is no contribution between them"; this rule does not apply where the party seeking contribution is a tortfeasor only, by inference of law; and is confined to cases where it must be presumed that the party knew he was committing an unlawful act. *Pearson v. Skelton*, 1 M. & W. 504. In *Price v. Harris*, 10 Bing. 331, a new trial was granted on the application of the plaintiff against one of two defendants, damages being assessed against the other defendant, who did not oppose the application. But the Court considered he ought not to be prejudiced by any new assessment of damages, and that the sum already assessed against him should be considered the maximum to which he could be made liable; so that though he might be liable to less, he should not in any circumstances be charged in execution for more. In *Doe dem. Dudgeon v. Martin*, 14 L. J. Ex. 128, it is stated the new trial in *Price v. Harris* was granted with the consent of the defendants.

Irish decision.

Effect of judgment without satisfaction.

¹ E. B. & E. 719.

² *Mulligan v. Curtis*, 100 Mass. 512, at 514. In *Bliss v. South Hadley*, 145 Mass. 91, where a child of eight was sent with a child under two years old into a street for air and exercise, and the baby was injured, it was held not negligence as matter of law on the parent's part, but to be a question of fact for the jury, depending on how much the street was used, and the intelligence and experience of the elder child.

Case suggested
by Lord
Campbell, C.J.,
examined.

The decision in Waite's case was, that the duty to the infant there arose out of contract, and in the circumstances there was no other duty; while the only contract that could be implied was, that the railway company allowed the child on the premises only on condition that all due care was exercised by the child's custodian. Even in this particular case of contract, the "identification" on which, in *Waite v. North-Eastern Railway Company*, Lord Campbell bases his decision, is not "complete."¹ For the child, by next friend, can clearly maintain an action for negligence against the nurse. The immunity of the railway company, in the words of Cockburn, C.J., in the Exchequer Chamber, is due to the fact that there is an "implied condition that the child is to be conveyed, subject to due and proper care on the part of the person having it in charge."² Eliminating, then, this contractual condition, there seems no reason why the child should not have an action against the joint tortfeasor with its nurse, in a case where the nurse is carrying a child across a road and is run down and the child injured, her negligence contributing, with that of the negligent driver, to produce the result. They are both negligent, and their co-operating act—not, as in Waite's case, successive acts—works an injury to the child, which it can certainly recover for against the nurse with whom its identity has been asserted. Again, for the wilful act of the parent or guardian—*e.g.*, throwing the child down a well—the child, suing by next friend, upon every ground of reason and principle, should recover; so, too, for negligence relating to property. What distinction, then, can be drawn as to person? And if the child could have an action for the negligence of the father or guardian, contract apart, there seems no reason why there should not be an action against the person whose negligence co-operated with the parent in producing the injury; nor yet against that person singly.

It must not be lost sight of in discussing this, and when Waite's case is cited as a decision in point, that in Waite's case the assumption was made throughout, that if the plaintiff's grandmother had acted with ordinary caution and prudence, neither she herself nor the infant would have suffered;³ and that this assumption was the foundation of the decision.⁴

Proceeding one step further, if the father is guilty of positive negligence, if such a term is admissible—of doing something without care or precaution through which the child suffers injury—the child has *prima facie* an action against him. On what

¹ E. B. & E. 719, at 727.

² At 733.

³ Per Lord Campbell at 726.

⁴ See per Lindley, L.J., *The Bernina*, 12 P. Div. 58, at 92.

ground can the alleged immunity of the father be placed, so that the *prima facie* right of the child to have an action is rebutted? If the child is injured through the contributory negligence of the father, it is manifest that the father is not entitled to recover for loss of services; for his own act brought about the loss for which he seeks to recover. But why should the child be identified with him? Not because of the father's moral duty; which, however strong, is wholly apart from legal obligation; while no legal obligation, to which the father's alleged immunity can be referred, is evident.

In principle, then, there seems to be no reason why the child should be disentitled by reason of the parent's negligence, in placing it or permitting it to be in a position in which it has sustained injury. In America, indeed, there are conflicting decisions on the point;¹ while in England the point does not seem to have been directly decided, at least in any reported case;² probably because juries have taken the matter into their own hands in cases where the defendant has been negligent, and negatived the issue of contributory negligence.

The conclusions above arrived at derive support from the decision in the case of the *Bernina*.³ Previously to that decision the case of *Thorogood v. Bryan*,⁴ though more often acquiesced in than approved,⁵ and occasionally dissented from,⁶ was generally followed as an authority, binding tribunals below the rank of a Court of Appeal, for the proposition

Conclusion.

Thorogood v. Bryan and The Bernina.

¹ *Lynch v. Smith*, 104 Mass. 52; *Bahrenburg v. R. R.*, N. Y. Court of Appeals, 1876, cited in Wharton, *Negligence*, § 312, note 2; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615; the greater part of the judgment in this case is based on the assumption that the defendant was not negligent; *Mangam v. Brooklyn City Railroad Company*, 36 Barb. (N. Y.) 230, 38 N. Y. 455; *Munn v. Reed*, 86 Mass. 431. The Massachusetts decisions have been thus summed up: "That if a child of two years and four months is unnecessarily sent unattended across and down a street in a large city, he cannot recover for a negligent injury (*Callahan v. Bean*, 91 Mass. 401); that to allow a boy of eight to be abroad alone is not necessarily negligent (*Carter v. Towne*, 98 Mass. 567); and that the effect of permitting a boy of ten to be abroad after dark is for the jury; (*Lovett v. Salem and South Danvers Railroad Company*, 91 Mass. 557), coupled with the statement, which may be ventured on without authority, that such a permission to a young man of twenty possessed of common intelligence has no effect whatever": Holmes, *The Common Law*, 128. In *Westbrook v. Mobile, &c., Railroad Company*, 14 Am. St. R. 587, it is laid down on the authority of Beach on Contributory Negligence that when the action is brought by the infant or for his benefit, the better rule is that the negligence or misconduct of the parent or custodian of the child shall not be imputed to the child. See also the note to the above cited case in which the American cases are collected; and the subsequent case of *Norfolk, &c., Railroad Company v. Groseclose*, 29 Am. St. R. 718.

² See, however, *Austin v. Great Western Railway Company*, L. R. 2 Q. B. 442, where conduct on the part of the mother was held not to disentitle an infant to recover where the injury arose out of an implied contract.

³ 12 P. Div. 58, 13 App. Cas. 1 (*sub nom.* *Mills v. Armstrong*).

⁴ 8 C. B. 115.

⁵ *Child v. Hearn*, L. R. 9 Ex. 176; *Armstrong v. Lancashire and Yorkshire Railway Company*, L. R. 10 Ex. 47.

⁶ *The Milan*, Lush. 388, 31 L. J. Adm. 105; *Adams v. Glasgow and South-Western Railway Company*, 3 Macph. 215.

that a passenger is identified with the driver of the vehicle in which he is, although the driver is not his servant, but the servant of third parties. While this was regarded as law, an insuperable obstacle was presented to the recovery of damages by a child injured through the contributory negligence of a nurse or guardian when under the actual control of such nurse or guardian. *Thorogood v. Bryan* was, however, definitely overruled by the Court of Appeal in *The Bernina*,¹ on the ground that "the proposition maintained in it is essentially unjust and inconsistent with other recognised propositions of law," and that the doctrine of identification, as laid down in *Thorogood v. Bryan*, is "quite unintelligible," and "leads to results which are wholly untenable—*e.g.*, to the result that the passengers would be liable for the negligence of the person driving them, which is obviously absurd."²

The facts in *Thorogood v. Bryan* shewed that: The deceased was getting out of an omnibus while the omnibus was in motion, and without waiting for it to draw up; the omnibus of the defendant coming up very fast behind, the deceased was unable to get out of the way of it, and was run over and killed. The Court of Common Pleas said that the plaintiff "chose his own conveyance, and must take the consequence of any default of the driver whom he thought fit to trust." The decision of the Court of Appeal, affirmed by the House of Lords, in *The Bernina* is, that this is not law. If, then, the plaintiff is not identified with the driver when there is at least a determination of the will that he should go rather than refrain from going in the conveyance, it would seem that much less would there be any doctrine of imputability when the conduct of the plaintiff had been altogether without self-determination, as in the case we have been considering of very young children.

Propositions of
Lord Esher,
M.R., in *The
Bernina*.

Lord Esher, M.R., has enunciated the law in a series of propositions.³

(1) If no fault can be attributed to the plaintiff, and there is negligence by the defendant, and also by another independent person, both negligences partly directly causing the accident, the plaintiff can maintain an action for all the damages occasioned to him against either the defendant or the other wrongdoer.

(2) If in the same case the negligence is partly that of the defendant personally, and partly that of his servants, the plaintiff can maintain an action either against the defendant or his servants.

¹ 12 P. Div. 58, per Lord Esher, M.R., at 82.

² Per Lindley, L.J., at 87.

³ 12 P. Div. at 61; per Lord Herschell, C.: "I concur with the judgments of the learned judges in the Court below, and specially with the very exhaustive judgment of the Master of the Rolls" (*Mills v. Armstrong*—*The Bernina*—13 App. Cas. 1, at 9).

(3) If in the same case the negligence is that of the defendant's servants, though there be no personal negligence by the defendant, the plaintiff can maintain an action either against the defendant or his servants.

(4) If in the same case the negligence, though not that of the defendant personally, or of a servant of the defendant, consists in an act or omission by another, done or omitted to be done in the way in which it is done or omitted to be done by the order or direction or authority of the defendant, the plaintiff can maintain an action either against the defendant or the person personally guilty of the negligence.

(5) If, although the plaintiff has himself, or by his servants, been guilty of negligence, such negligence did not directly partly cause the accident, as if, for example, the plaintiff or his servant having been negligent, the alleged wrongdoers might by reasonable care have avoided the accident, the plaintiff can maintain an action against the defendant.

(6) If the plaintiff has been personally guilty of negligence, which has partly directly caused the accident, he cannot maintain an action against any one.

(7) If, although the plaintiff has not been personally guilty of negligence, his servants have been guilty of negligence which has partly directly caused the accident, the plaintiff cannot maintain an action against any one.

(8) If, although the defendant or his servants has, or have been, guilty of negligence, the plaintiff or his servants could by reasonable care have avoided the accident, the plaintiff cannot maintain an action against any one.¹

In the House of Lords, which affirmed the decision of the Court of Appeal, Lord Bramwell, though concurring in the decision on the case before the house, in a written opinion, which, however, was not delivered, supported the decision in *Thorogood v. Bryan* on the pleading.² The declaration was, that the defendant, by her servant, so carelessly drove and directed the carriage and horses, that, by the negligence and improper conduct of her servant in that behalf, they ran against the deceased and knocked him down, &c., and by reason of the premises he died. The plea

In the House of Lords, Lord Bramwell considered *Thorogood v. Bryan* right on the pleadings.

¹ "It follows," says Lord Esher, M.R., 12 P. Div. at 82, at the close of a long judgment in which the English and American decisions are reviewed—"that the propositions stated at the commencement of this judgment contain the law on this matter perhaps not exhaustively, and that the proposition contained in *Thorogood v. Bryan* is not to be added to them." The Supreme Court of the United States had previously declined to follow *Thorogood v. Bryan* in *Little v. Hackett*, 116 U. S. (9 Davis) 366, at 371. "We have only to consider," said the Court, "whether the relation of master and servant existed between them"—i.e., the passenger and the driver; and this had been decided adversely to the existence of the relation so far back as *Quarman v. Burnett*, 6 M. & W. 499.

² *Sub nom. Mills v. Armstrong*, 13 App. Cas. 1.

Lord Herschell
doubted.

was "not guilty." Upon that issue it was for the plaintiff to prove that the deceased was killed by a negligent act in the defendant's driver; but this was not done by shewing that he was killed by a negligent act of the defendant's driver, and another negligent act in the driver, of the vehicle in which he was riding. Lord Herschell doubted¹ whether, even as a pleading point, it would have been effectual if the facts were properly averred; since, in the case of a collision between two vehicles, if a person unconnected with either were injured, and were to sue either wrongdoer in respect of the injury, the defendant would not be able to maintain a defence that, but for the negligence of another person, the accident would not have happened; and the case of a passenger in no way differs.

Grounds of
the judgment
of the House
of Lords.

The judgment of the House of Lords, however, was based on the broad ground of disapprobation of the doctrine of "identification," which, says Lord Herschell, "appears to me to beg the question, when it is not suggested that this identification results from any recognised principles of law, or has any other effect than to furnish that defence, the validity of which was the very point in issue."²

Lord
Bramwell's
test cases.

Lord Bramwell, in his opinion,³ puts several test cases, which he considers are involved in the proposition affirmed by the House of Lords—viz., that a passenger is not identified with those in charge and control of the vehicle in which he is being carried in respect of their negligence, so as to be disentitled to recover for the negligence of third persons, in conjunction with that of those in charge and control of the vehicle which produced the injury. "If," says he, "the passenger can maintain the action, why cannot the owner of the carriage for injury to it?" Plainly, because he is in default. His duty was to provide a suitable vehicle; and, as against third persons, if he had servants, servants who would not be guilty of negligence; if he himself took charge he had to see that he himself was free from negligence. He has chosen to act in the engagement of servants; it is but fair, as against the third person, that he should not recover when, but for his default in the engagement of them, or at least for their defaults after he had engaged them, he sustains injury, which, had he not had negligent servants, would not have happened. If, as Lord Bramwell says, the maxim *Qui facit per alium facit per se* does not apply, the allied maxim *Respondeat superior* would seem to do so.

The same reasoning applies where the owner is a passenger. The law contemplates him as driving his own vehicle;

¹ At 8.

² At 7.

³ At 13.

if he prefers to do it by deputy there seems every reason why he should answer for the hand he uses instead of his own, as if it were his own. "Suppose," says Lord Bramwell, again, "the owner's wife is a passenger, and injured, can she maintain such an action?" True, she cannot for personal injuries; because her position is a wholly exceptional one.¹

The solvent proposed by Lord Watson for all these difficulties is the inquiry, Does the servant in charge of the vehicle look for orders to the passengers; or have they any further right to interfere with his conduct of the vehicle, except, perhaps, the right of remonstrance when he is doing, or threatens to do, something that is wrong and inconsistent with their safety? It has now been held that the proper question for the jury in this class of case must amount to, Did the negligence of those in charge of the vehicle, other than that in which the plaintiff was, in whole or in part, cause the accident? If the jury find it did, then the verdict must be for the plaintiff.²

The American cases had, previously to *Mills v. Armstrong*, most generally adopted the line of decision marked out in that case.³ There is a curious case however, in the Supreme Court of the United States, holding that where a person is injured on a vessel, through a marine tort arising partly from the negligence of the officers of the vessel and partly from his own negligence, and sues in Admiralty for damages for his injuries, he is not debarred from all recovery because of the fact that his own negligence contributed to his injuries.⁴ This, whatever the merits of the decision, is clearly not the law of England. The Court of the United States, however, seems to have gone on the consideration that the rule of dividing damage between negligent ship-owners is a rule of Admiralty practice, not merely in the case of ships injured by reciprocal negligence, but applicable generally in Admiralty suits. In the English cases, however, the rule is limited to ships⁵ and does not extend to persons. But, further,

¹ But by sec. 2 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), she may obtain redress, as regards her husband by the same remedies, for injuries done to her property as any other person. In short, her husband may break her leg with civil impunity, but not her watch.

² *Mathews v. London Street Tramways Company*, 58 L. J. Q. B. 12. A curious case is *Nicholls v. Great Western Railway Company*, 27 Upp. Can. Q. B. 382.

³ See *Borough of Carlisle v. Brisbane*, 57 Am. R. 483, and notes 488, 511. There is an instructive judgment, subsequent to the overruling of *Thorogood v. Bryan*, in *Dean v. Pennsylvania Railroad Company*, 129 Pa. St. 514, 15 Am. St. R. 733, where the peculiar doctrine of the Pennsylvanian Courts on this point is reconsidered, and where, on the special facts, a guest riding with the driver was held precluded from recovering.

⁴ In the *Max Morris*, 137 U.S. (30 Davis) 1. See as to Owen's case, *The Bernina*, 12 P. Div. 58, 84, 96.

⁵ *The Milan*, 31 L. J. Adm. 105, *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Company*, 10 Q. B. Div. 521, 538, 546. See rule stated, Addison, *Torts* (4th ed.), 401.

the rule does not seem applicable to persons. The rule is, that the damage to both parties is to be divided by half. This, where the parties are ships, is intelligible, and there is reciprocity. Where one party is a person, the other a ship, all community ceases. The rule becomes one which allows a person injured in a marine collision for which he is somewhat to blame, to recover for a proportion of his injuries—a principle of which no traces can be found in Admiralty law, and which bears no relation to the principle which governs where ships only are concerned. The ship may be sold to compensate him, but he cannot be sold to compensate the ship. The damage he may do the ship will not unlikely be the merest scratch. The damage the ship will do him, will not improbably verge on destruction. The rule as applied to ships is founded on a rough equity that starting from an assumption of some equality of forces works out a theory of compensation on a common basis where there is common blame. As applied to a man and a ship, there is no common basis by which the relative damage can be appraised, neither does the policy of encouraging shipping avail. The reason of the rule ceasing, it is only natural that the rule itself should not apply.

CHAPTER VI.

LORD CAMPBELL'S ACT

(9 & 10 Vict. c. 93, amended by 27 & 28 Vict. c. 95).

THE common law maxim, *Actio personalis moritur cum personâ*,¹ *Actio personalis moritur cum personâ.* is not applicable to causes of actions on contracts; it relates to actions in tort alone where the remedy dies with the person, unless statutory law makes an exception.² Thus, at common law, no executor or administrator could maintain an action for the loss of the life of his testator or intestate; and for two reasons—first, because the law provides remedy for such mischiefs only as affect *legal* rights; and a man has not such a legal right in the life of his parent, or of his child, as he has in his own; for the relation between parents and their children give rise merely to what moralists call “imperfect obligations;”—and secondly, because it was considered impossible to form an estimate of the

¹ As to this see Noy, Maxims, 14; Wheatley v. Lane, 1 Wms. Saund. 216; 1 Wms. Exors. 9th ed. 1600; Broom, Legal Maxims (6th ed.) 855; Com. Dig. Administration, B 13; Covenant, B 1; Bac. Abr. Executors and Administrators (N); Mason v. Dixon, Sir William Jones 173; Morley v. Polhill, 2 Vent. 56. Sir John Hawles gives as a reason for the abatement of a civil action by the death of the defendant, that there may be matters of defence in his personal knowledge which are unknown to his representatives, 11 How. St. Tr. 476. “The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appears to us to be those in which property, or the proceeds or value of property belonging to another, have been appropriated by the deceased person and added to his own estate or moneys;” per Bowen, L.J., Phillips v. Homfray, 24 Ch. D. 439, at 454; where Bowen, L.J., traces the history of the maxim, *Actio personalis moritur cum personâ* in considerable detail in a most full judgment; see too 44 Ch. D. 694, Bowker v. Evans, 15 Q. B. D. 565. “The maxim, *Actio personalis moritur cum personâ*, has a very limited application in the law of Scotland; and in evidence of that proposition, I need do no more than refer to the elaborate opinions of Lord Neaves and the other judges in Auld v. Shairp, 2 Rettie 191,” per Lord Watson, Wood v. Gray & Sons (1892), App. Cas. 576, at 580. Bern’s Executors v. Montrose Asylum, 20 Rettie 859, Law Quarterly Review, vol. x. 182. In Canada the maxim was discussed in Monaghan v. Horn, 7 Can. S. C. R. 409. By 15 & 16 Vict. c. 76 (The Common Law Procedure Act, 1852), s. 139, “The death of either party between the verdict and the judgment shall not hereafter be alleged for error so as such judgment be entered within two terms after such verdict.” This enactment applied to all actions whether they would have survived to an executor or not; Kramer v. Waymark, L. R. 1 Ex. 241. See, however, 46 & 47 Vict. c. 49, ss. 3, 7, and Order xvii. r. 1, R. S. C. 1883. See also Sibbald v. Grand Trunk Railway Company, 19 Ont. R. 164; Waddell v. Ross, 13 N.S.W.R. Equity 13.

² Per Lord Abinger, C.B., Raymond v. Fitch, 2 C. M. & R. 597.

value of human life either to a man himself or to others connected with him.

History of
the law.
Higgins v.
Butcher.

The earliest reported statement of the law as thus laid down is said to be *Higgins v. Butcher*.² Plaintiff's wife died of an assault and battery by the defendant, for which plaintiff brought an action for damages. Tanfield, J., gave as the reason of the Court for their judgment: "If a man beat the servant of J. S. so that he dies of that battery, the master shall not have an action against the other for the battery and loss of service, because, the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into a felony, and that drowns the particular offence and private wrong offered to the master before, and his action is *thereby* lost." The reason is clearly wrong in the light of modern decisions;³ the fact probably right with reference to established doctrine. Lord Ellenborough's *Nisi Prius* ruling in *Baker v. Bolton*,⁴ has in modern times been looked on as of determining weight on that point. Plaintiff seeking to recover damages for loss of his wife's services, the jury were directed that "the damages as to the plaintiff's wife must stop with the period of her existence;" since "in a civil court the death of a human being cannot be complained of as an injury." This decision was generally followed both here and in America⁵ till 1873; when, in *Osborn v.*

Baker v.
Bolton.

¹ Per Parke, B., *Armstrong v. South-Eastern Railway*, 11 Jur. 758.

² Yelv. 89. As to this case see *Midland Insurance Co. v. Smith*, 6 Q. B. D. 561, at 568.

³ *White v. Spettigue*, 13 M. & W. 603. *Midland Insurance Company v. Smith*, 6 Q. B. D. 561. See *Ex parte Ball In re Shepherd*, 10 Ch. Div. 667.

⁴ (1808) 1 Camp. 493.

⁵ See the cases cited in the defendant's argument in *Osborn v. Gillett*, L. R. 8 Ex. 88. The whole course of the authorities is to be found in the elaborate arguments and judgment in *The Harrisburg*, 119 U. S. (12 Davis) 199. There, after examining the rule in most of the chief legal systems, the common law rule in America is determined to be identical with that established by the English decisions. There is also a mine of learning illustrative of the Roman, Spanish, French, and English authorities bearing on the proposition:—"An action for damages caused by the homicide of a free human being cannot be maintained" in *Hubgh v. New Orleans and Carrollton Railroad Company*, 6 La. Ann. 495; and *Hermann v. New Orleans and Carrollton Railroad Company*, 11 La. Ann. 5. See *The Corsair*, 145 U.S. (38 Davis) 335, at 348. The question of the liability of one, through whose wrongful act another has been killed, to compensate third persons for damages caused by the wrongful act has been several times discussed. In *Connecticut Mutual Life Insurance v. New York, &c., Railroad Company*, 25 Conn. 265, an insurance company sued a railway company for the value of a policy they had been compelled to pay by reason of the death of the assured through the railway company's negligence. They were held disentitled to recover, and the principle was formulated that, where one person has contractual relations with another, an injury inflicted on the latter, which disastrously affects those relations, does not constitute a legal injury to the former. A similar conclusion is expressed by the Supreme Court of the United States in *Insurance Company v. Brame*, 95 U.S. (5 Otto) 754; *Lee v. Hill*, 24 Am. St. R. 666. These cases should be taken in connection with the discussion in the next note. *Mulcahey v. Washburn Car Wheel Company*, 145 Mass. 281, 1 Am. St. R. 458, decides that if a person mortally injured survives but a moment, and suffers, a right of action accrues and survives to the personal representatives.

Gillett,¹ the Court holding that, where the relation of master and servant exists, a master cannot maintain an action for injuries which cause immediate death to his servant, Bramwell, B., dissented very strongly on the ground that no reason can be given for such a rule; while to establish such a rule without reason requires very clear authority. This dissent occasioned a vigorous onslaught against the doctrine approved by the Court, yet despite the adoption of Bramwell, B.'s, view by influential text writers,² the law in the contrary sense may be regarded as settled. The discussion of the subject is here remitted to a note.³

Osborn v.
Gillett.

¹ L. R. 8 Ex. 88, Appleby v. Franklin, 17 Q. B. D. 93, 94.

² Pollock, Torts (3rd ed.), 57; Broom, Legal Maxims (6th ed.), 868-9; Smith, Negligence (2nd ed.), 255; Clerk and Lindsell, Torts, 158; Contra, Shearman & Redfield, Negligence (4th ed.), § 124.

³ Sir Frederick Pollock, Torts (3rd ed.), 58, regards the authorities previous to Osborn v. Gillett as "inconclusive." He points out that a master's cause of action for the death of his servant is altogether a different one from the *actio personalis* of the maxim. "He does not represent or claim through the servant; he sues in his own right, for another injury or another estimation of damage; the two actions are independent, and recovery in the one action is no bar to recovery in the other. Nothing but the want of positive authority can be shewn against the action being maintainable." As to this, see Winterbottom v. Wright, 10 M. & W. 109, per Lord Abinger, C.B., at 114; and Tollit v. Sherstone, 5 M. & W. 283, per Manle, B., at 289; Alton and another v. The Midland Railway Company, 34 L. J. C. P. 292, is also considerably in point. (As to this last case, cp. Daly v. Dublin, Wicklow, and Wexford Railway Company, 30 L. R. Ir. 514; and Heizer v. Kingsland and Douglass Manufacturing Company, 33 Am. St. R. 482.)

Sir Frederick Pollock, Torts (3rd ed.), 485, considers "the weight of principle and authority" "to be so strong against Alton's case, that notwithstanding the respect due to the Court before which it came, and which included one of the greatest masters of the common law at any time, the only legitimate conclusion is that it was wrongly decided." I cannot concur in Sir F. Pollock's estimate, partly possibly because his statement of facts is not borne out by the report. He says: "A servant travelling by railway on his master's business (having paid his own fare) received hurt," &c. The declaration merely stated that one Baxter "was and from thence hitherto has continued and still is the servant and traveller of the plaintiffs," and it charges that Baxter "so being the servant and traveller of the plaintiffs as aforesaid, became and was received by the defendants as a passenger." It appears, then, from the declaration that Baxter was the servant or traveller of the plaintiffs, but not that he was travelling on their account or on any other account than his own. The opening words of Willes, J.'s, judgment place the matter beyond doubt. "It is admitted," he says, "by the defendants that the authorities establish this—viz., that a master may sue for the loss of the services of his servant, which has been caused by a wrong or injury done to the servant in the course of his master's business. On the other hand, it is indisputable that no such action has ever been sustained (if it has ever been brought) where the injury done to the servant was not one which was actionable as for a simple wrong, but was for a breach of duty arising out of a contract made with the servant," 34 L. J. C. P. 292, at 297. The inquiry then was, not what is the right of a master to sue for an injury done to his servant, *quod* servant; for that was indisputable; but what is the right of a master to sue for an injury to his servant when the relation of master and servant is an incident only to the injured man's position and is not otherwise brought into the case? The first point to note is, that a contract like that mentioned being, by the terms of the proposition, a contract outside the scope of the servant's authority, the master can in no case be sued on it; neither can he sue on it. Then, secondly, is there any *duty* towards the master? Sir F. Pollock thinks there is a duty, and that the negation of its existence is inconsistent "with the authorities relied on for the plaintiff, and in particular with Marshall's case, a former decision of the same Court." Marshall's case, 11 C. B. 655, seems very distinguishable. A master took a railway ticket for his servant, whose luggage was lost during the journey through the negligence of the railway company. The objection on the part of the railway company to being held liable to the servant for their negligence was, that the action was on a contract. The judgment against the company was on the ground that "an action like this is to be regarded as an action of tort against the defendants as carriers, on the custom of the realm." "If," said

9 & 10 Vict.
c. 93.

By 9 & 10 Vict. c. 93, the common law is so far limited that an action is given against a person who by his wrongful act occasions the death of another.

Section 1 of that statute enacts that "whosoever the Jervis, C.J., "the plaintiff, instead of losing his property, had broken his leg, he could have had an action for his personal suffering, and his master might have sued for the loss of his service. But in what respect could the plaintiff have an action for his personal suffering? Not because there was a contract between him and the company, but by reason of a duty irrespective of the contract." In Marshall's case, therefore, the injury was a direct and personal one. In Alton's case the injury was consequential, and (without information given) not to be contemplated as the result of an injury to Baxter by the negligence of the defendants. *Everard v. Hopkins*, 2 Bulst. 332, was an action by a master against a surgeon for giving unwholesome medicine to the plaintiff's servant. But the contract was with the master. Further, in the cases put in argument, the servant was immediately upon his master's business, which directly was impeded by the defendants' act. All the other authorities relied on by the plaintiff in Alton's case are in support of the proposition that an action will lie against a carrier for breach of duty independently of the existence of any contract. This is clearly so and not disputed. The point here is whether, when a person injured happens to have a master, the master's injury is a natural and probable consequence of the defendant's wrongful act. In this view, Williams J.'s statement in 1 Wms. Saund. 474, quoted by Sir F. Pollock, at 484, is beside the point. "The Court," says Sir Edward Vaughan Williams, "decided this case on the principle that one who is no party to a contract cannot sue in respect of the breach of a duty arising out of the contract. But it may be doubted whether this was correct; for the duty, as appears by the series of cases cited in the earlier part of this note, does not arise exclusively out of the contract, but out of the common law obligation of the defendants as carriers." Admitting the Court decided the case by negating a contract, and that such a ground is insufficient, unless it also negatives the existence of any duty, the fact that the Court ignored the existence of a duty is far from raising a presumption of there being one. To raise a duty it must be shown that injury to the plaintiff is the "natural and probable" result of the defendant's act. The contract made with Baxter was without reference to his employer, and was not made by Baxter as part of his service. The defendants, then, while answerable for all injury to Baxter flowing from their unlawful act, are scarcely liable for an injury to third persons; which they could not have foreseen as probable, without the concurring fact that of travellers by rail, such a proportion are servants that railway companies are affected with knowledge that a particular passenger is one; and further, that the probability of injury to him renders a loss to his master a natural and probable consequence. Lopes, J.'s, decision in *Berringer v. The Great Eastern Railway Company*, 4 C. P. D. 163, "The claim is against the company not parties to the contract of carriage for a pure tort," is not in accord with the view last contended for; but that was said in an action by a father, both on his own account and as next friend of his son, for injuries done to the son by a train of a company other than that with which his contract was. The case differs in this, that, by the common law, a parent is entitled to the wages of his unemancipated children (1 Bl. Com. 453), and so the presumption lacking in the former case is present here. In *Martin v. The Great Indian Peninsular Railway Company*, L. R. 3 Ex. 9, the defendants had knowledge, or the means of knowledge, that the goods carried by them were not the property of those with whom their contract was, and direct damage was done to them; for which, with some doubt it was held the railway company were liable. While in *Becher v. Great Eastern Railway Company*, L. R. 5 Q. B. 241, a master was held disentitled to recover for the loss of his portmanteau by a railway company, who had received it as personal luggage of a servant who had been received by them as a passenger, because "if they had been informed that the portmanteau was not his luggage, they would not have been bound to take it, and in all probability they would not have taken it."

Sir F. Pollock says, at 484: "Alton's case, moreover, seems to be virtually overruled by *Foulkes's case*, which proceeds on the existence of a duty not only in form but in substance independent of contract." Here the damage directly arose from the negligent act of the defendants inflicting actual bodily injury to the plaintiff; while in Alton's case the injury to the plaintiffs was only through an injury to some one else, and not a necessary result of such injury. It might well have been that Baxter was injured, and the plaintiffs absolutely benefited thereby. The one case would then scarcely overrule the other, since the material point, the transmission of the injurious consequence, is not only a step more remote, but not necessarily arising at all. Alton's case, moreover, was not once mentioned, if the reports in the Law Reports are accurate, by any one of the very eminent counsel in arguing, who would assuredly have cited it—if the least in point;

death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every

or by any one of the judges who were said to be virtually overruling it. If, however, Alton's case is looked at carefully it will be seen that the criticism as to a potential duty is absolutely irrelevant as against that particular decision, though of importance in the present discussion on the general principle. Erle, C.J., 34 L. J. C. P. 292, at 296, thus states what he regarded as the point raised: "There is a demurrer to the declaration, but the point on which my judgment turns is made more clear by reference to the plea, that the defendants contracted with Baxter to carry him as in the declaration, and that they did not contract with the plaintiffs. Therefore, *it is admitted on the demurrer to that plea, that the relation between the defendants and Baxter was created by a contract with him.*"

Even if a duty independent on contract had been alleged, the result would not have differed. It might then have been pointed out that to make a wrongdoer liable in respect of all the contracts under which a person injured by him was bound at the time of the injury would be admitting that "undefined liability" repudiated in *Langridge v. Levy*, 2 M. & W. 519, and *Winterbottom v. Wright*, 10 M. & W. 109; (cp. per Blackburn, J., *Cattle v. Stockton Waterworks*, L. R. 10 Q. B. 453, at 457) that between this liability and the liability to a master in respect of an injury done to a person who happened to be his servant when not actually in his service, no valid distinction can be drawn; that to found liability it must be shewn that the damage complained of is the natural and reasonable result of the defendants' act; and must, moreover, be such a consequence as would in the ordinary course of things flow from the act complained of. Now the ordinary consequence of injuring a man out of a crowd can scarcely be said to work injury to his employer, when, very probably, he has no employer; or the injury does not interfere with his services to his employer; or his employer is not injured by the loss of his service. If the servant is injured while engaged in the service of his employer, a very different state of things arises. Then the injury is a direct injury to the employer's work; the case is the same as breaking his machinery.

To revert to the consideration of *Osborn v. Gillett*. Here the matter is purely one of legal doctrine. A distinction troubles Sir F. Pollock considerably. He says (*Torts* (3rd ed.), 57): "A master can sue for injuries done to his servant by a wrongful act or neglect, whereby the service of the servant is lost to the master. But if the injury causes the servant's death, it is held that the master's right to compensation is gone." From the point of view of early law, the distinction is very intelligible. If a man's servant were injured, the relation was not thereby dissolved, but the master had a sick servant on his hands; whence loss and expense. If the servant were killed, another was readily procurable. The change from one to another was not matter of moment; cp. *Sykes v. North-Eastern Railway Company*, 44 L. J. C. P. 191. Even if it were, another principle came in that was conclusive. A quotation from Lappenberg, *History of England under the Anglo-Saxon Kings*, Thorpe's ed., vol. ii. 337, will make the point clear. After treating of the "wergild," which was all received by the relatives of the slain in compensation for his death, the passage runs thus: "Previously to paying the 'wergild,' the king's 'mund' (a fine to the king for breach of his protection) was to be levied; after which, within twenty-one days, the 'healsfang' (*apprehensio colli, collistrigium*) was to be discharged, and after that, within twenty-one days, the 'manbôt,' or indemnity to the lord of the slain for the loss of his man, the amount of which was regulated by that of the 'wer,' being thirty shillings for a ceorl, eighty for a six-hynde man, and a hundred and twenty for one of twelf-hynde degree. In addition to all these, there was still the 'fyhtwite' due to the crown for the breach of the peace which, as well as the 'manbôt,' could never be remitted." (There is a chapter (ch. x.) on the "Wergild" in Kenble, *The Saxons in England*, and an excellent article in *The Penny Encyclopædia*, headed *Wehrgeld*; see too Du Cange, *Gloss. Weregeldum*; and Reeves, *History of English Law*, (2nd ed.), vol. i. 15.) In the period during which the wergild and its subsidiary valuations were operative, the criminal law fixed the amount of compensation recoverable for the death of a man, and there was no room for the recovery of unliquidated damages as a civil remedy besides. When the system represented by the wergild was becoming or become obsolete by the law exacting other penalties for homicide, the traditionary principle that civil damages could not be recovered for the death of a man would, and most probably did, survive and defeated any suggestion of suing in respect thereof. Hence the absence of any authority in the Year Books, which is greatly relied on by those impugning the correctness of *Osborn v. Gillett*. The principle—the historic and legal principle—was so clear and well recognized that

such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

By section 2, "every such action shall be for the benefit of the wife, husband, parent, and child¹ of the person whose death shall have been so caused, and shall be brought by, and in the name of, the executor and administrator of the person deceased, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct."² This section was amended by 27 & 28 Vict. c. 95, s. 1, which provides that where no action is brought within six months by the representative, then an action may be brought by persons for whose benefit such action would have been brought if it had been brought by the personal representative.³ Section 2 provides that the defendant may pay money into court in one sum without specifying the shares into which it is to be divided.

By section 3 of the principal Act (9 & 10 Vict. c. 93) "not more than one action shall lie for and in respect of the same subject-matter of complaint," and "every such action shall be commenced within twelve calendar months after the death of such deceased person."

no one dreamed of calling it in question till many centuries after, when the reason of it was lost sight of. That being so, it is irrelevant whether "Lord Bramwell's judgment is unanswerable on principle"—that is, on moral principle with reference to modern ideas, or juristic principle derived from some abstract standard outside the province of an expositor of the law; to quote the words of Kelly, C.B. (at 100): "We must leave it to the Legislature to provide for a case like this," and "we ought not to take upon ourselves to create a new cause of action which would be to make and not to expound the law." *Osborn v. Gillett* was much considered in *Monaghan v. Horn*, 7 Can. S. C. R. 409, especially by Taschereau, J., who regards the case as concluding the point raised. Cp. Bell, *Principles of the Law of Scotland* (9th ed.), § 2029; and the cases cited, *ante*, 210, n. 5.

¹ The mother of an illegitimate child has by the law of Scotland no right to sue in respect of negligence causing its death: *Ciarke v. The Carfin Coal Company* (1891), App. Cas. 412; *Wood v. Gray and Sons* (1892), App. Cas. 576.

² For the wrongful killing of his infant ward, a guardian has no right of action except to reimburse the ward's estate for expenditure made for care and medical attendance or for funeral expenses; the right of action for loss of services during minority is for the father or mother. *Louisville, &c., Railroad Company v. Goodykroontz*, 12 Am. St. R. 371, note (Measure of damages) 375-383. As to funeral expenses, see per Bramwell, B., L. R. 8 Ex. 88, at 99; but also *Dalton v. South-Eastern Railway Company*, 4 C. B. N. S. 296.

³ Under the similar Canadian Act an action for damages by reason of the death of a person can be maintained by the person beneficially entitled, though brought within six calendar months from the death, unless there be at the time an executor or administrator of the deceased: *Lampman v. Gainsborough*, 17 Ont. R. 191.

By section 4 the plaintiff on the record is to deliver full particulars of the person or persons on whose behalf any action shall be brought and of the nature of the claim made; and section 5 defines the word parent as used in section 2 as including respectively father and mother, grandfather and grandmother, stepfather and stepmother; and the word child as including son and daughter, grandson and grand-daughter, and stepson and step-daughter.

The first point that arose under the Act was to determine by what legal principles the right to compensation should be determined. In the earliest reported case *Armsworth v. South-Eastern Railway Company*,¹ Parke, B., thus deals with it: "You cannot estimate the value of a person's life to his relatives. No sum of money could compensate a child for the loss of its parent, and it would be most unjust if, whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done. Here you must estimate the damage by the same principle as if only a wound had been inflicted. Scarcely any sum could compensate a labouring man for the loss of a limb, but yet you don't in such a case give him enough to maintain him for life; and in the present case you are not to consider the value of his existence as if you were bargaining with an annuity office; for in that view you would have to calculate all the accidents which might have occurred to him in the course of it, which would be a very difficult matter. I therefore advise you to take a reasonable view of the case, and give what you consider a fair compensation."

Legal principles determining the right to compensation under the Act. Parke, B.'s ruling in *Armsworth v. South-Eastern Railway Company*.

The main principle laid down thus far is that compensation is to be governed by a consideration of what the man himself would be entitled to if he were alive and suing, and not his representatives. This involves a compensation for pain and suffering, but excludes payment for wounded feelings due to the death. In many cases—as, for instance, when the deceased worked for a weekly wage—it would be identical with the loss of wages, with a deduction to meet the contingency of the means of earning wages being defeated by other circumstances, plus the pain, suffering, and expenses during a long illness. In cases of instant death it admits the loss of wages as far as the survivors had expectation of benefit from them only, subject, as before, to contingencies that might have prevented their being earned. In cases where the deceased was in possession of an income from invested property, it would seem to give compensation for pain

¹ (1847) 11 Jur. 758, at 760.

and suffering, but for nothing further. The case of a man with a fixed annual income—a pension, say—terminable by death alone, could not possibly be met “by the same principle (of assessing damage) as if only a wound had been inflicted,” so far as the death affects the surviving relatives.

Parke, B.'s,
test inade-
quate.

The test suggested was, therefore, obviously inadequate, as far as it professed to be positive ; in so much as it did not clearly discriminate between the principle of damages applicable under the Act and the general principles of damages in the case of actions for personal injuries ; and between the different position the plaintiff is placed in when suing for the death of another under the Act, and the case of a plaintiff in an ordinary action of personal injury suing for damages to himself. In its negative aspect it indicates that the loss to the survivors in the inclusive meaning of the term, embracing as well the sentimental affections as the pecuniary interests, could not be the right principle, and thus it tends to eliminate one uncertain element. The inclusion of sentimental regards as matter for compensation was, however, contended for, in the next reported case, by Sir Frederick Thesiger before Pollock, C.B.,¹ in the Court of Exchequer. Evidence tending to show circumstances that accentuated the loss, yet which did not go to pecuniary loss was there rejected. “It is,” said the C.B., “a pure question of pecuniary compensation, and nothing more, which is contemplated by the Act, no matter who or what the survivors may be.” “The meaning of this enactment is

Pollock, C.B.'s,
opinion in
Gillard v.
Lancashire
and Yorkshire
Railway
Company.

this :—If a man's life be valuable to his family by reason of his possession of an annuity, his family have now a right to say, ‘We have lost the life on which this annuity hung,’ and they may claim compensation for that loss, but nothing more ; they cannot enter into the question of the shock to their feelings.”²

Modified in
Pym v. Great
Northern
Railway
Company.

This opinion was to some extent qualified by Pollock, C.B., in *Pym v. Great Northern Railway Company*, where he says :³ “I am not prepared to say that what is imputed to me in *Gillard v. Lancashire and Yorkshire Railway Company* is correct law—namely, that the statute enables the family ‘to recover that which the deceased would himself have sued for had the accident not terminated fatally’ ; probably the case of a tenant for life of a large landed property was not within my contemplation. I agree,

¹ *Gillard v. Lancashire and Yorkshire Railway Company* (1848), 12 L. T. (O.S.) 356.

² Sir Frederick Thesiger, in shewing cause in *Blake v. Midland Railway Company*, remarked on this ruling of the Chief Baron : “The learned judge entertains views which may probably be deemed peculiar on the subject of compensation for personal suffering. When at the bar, his lordship, as counsel for the plaintiff in *Carpue v. London and Brighton Railway Company*, avowedly withdrew from consideration as a subject of damages the bodily suffering which the plaintiff had undergone.”

³ 4 B. & S. 396, at 402.

however, in the doctrine that the damage must be given for pecuniary loss alone."

The two cases we have already considered were rulings at *Nisi Prius*; *Blake v. Midland Railway Company*,¹ the next case, is a decision of the Court of Queen's Bench. At the trial, Parke, B., told the jury "he thought there was great difficulty in fixing any measure but that of pecuniary injury; but that, if they considered the plaintiff entitled to any compensation for the bereavement she had sustained, beyond the pecuniary loss, they were to make their estimate accordingly." The learned judge suggested to the jury to estimate the pecuniary loss by taking as much of the annual income as a wife living with her husband, and maintained according to her station in life, might be supposed to enjoy, and, considering this as an annuity, to reckon its value at so many years' purchase as it was worth, reference being made to the ages of the husband and wife; then to deduct any sums the wife might be entitled to by reason of the death of the husband, and to award the balance as compensation under the statute. It was objected that allowance was not made for contingencies which might lessen the annual amount supposed to be enjoyed by the wife during the husband's lifetime; and the learned judge admitted these should be considered, although they were very difficult to estimate. The jury having found a verdict for the plaintiff, a new trial was moved for, on the ground, first, that the damages, if calculated on pecuniary loss alone, were excessive, and that the jury had not been directed with sufficient exactness; secondly, that they should have been expressly directed to take nothing into consideration in the assessment of damages except actual pecuniary loss. A considered judgment was delivered by Coleridge, J. He clears away the difficulty of those cases not provided for by the rule as originally laid down by Parke, B.,² where the deceased suffered in a long illness, and where, if the measure of damages was what was a fair compensation to the deceased, damages would be recoverable for the pain and suffering, by the observation: "This Act does not transfer a right of action to the representative, but gives to the representative a totally new right of action on different principles."³ The measure of damages is defined to be, "not the loss or suffering of the deceased, but the injury resulting from his death to his family." The conclu-

Blake v. Midland Railway Company.
Direction of Parke, B.

Judgment of the Queen's Bench delivered by Coleridge, J.

¹ (1852) 18 Q. B. 93.

² *Armstrong v. South-Eastern Railway Company*, 11 Jur. 758, 760.

³ In *Senior v. Ward*, 1 E. & E. 385, at 393, Lord Campbell, delivering the judgment of the Court, said: "We conceive that the Legislature, in passing the statute on which this action is brought, intended to give an action to the representatives of a person killed by negligence only where, had he survived, he himself, at the common law, could have maintained an action against the person guilty of the alleged negligence."

sion of the Court is, "that the learned judge at the trial ought more explicitly to have told the jury that, in assessing the damages they *could not take into consideration the mental sufferings of the plaintiff* for the loss of her husband; and that, as the damages certainly exceeded any loss sustained by her *admitting of a pecuniary estimate*,¹ they must be considered excessive." The law has since been considered settled in this sense.

Question whether damages must be confined to those arising from actual legal obligation, or whether a reasonable expectation of pecuniary benefit should be admitted. *Franklin v. South-Eastern Railway Company.*

The next point raised was, whether the pecuniary loss, accruing to the plaintiff from the death in respect of which he sues, must arise from an actual legal obligation, or whether it is sufficient to shew a reasonable expectation of pecuniary benefit. In *Franklin v. South-Eastern Railway Company*,² the plaintiff, who was old and infirm, had received assistance from his son to the extent of 3s. 6d. a week. The son was killed by the negligence of the defendants, and the father brought an action for compensation for his death. Bramwell, B., left to the jury whether the plaintiff had a reasonable expectation of any, and what, pecuniary benefit from the continuance of the life of the deceased. The jury found for the plaintiff. The Court made absolute a rule for a new trial, solely on the ground that the damages were excessive. On the question of what was the right direction, the summing up of the judge at the trial was upheld. Pollock, C.B., said: "We do not say that it was necessary that actual benefit should have been derived, a reasonable expectation is enough; and such reasonable expectation might well exist, though, from the father not being in need, the son had never done anything for him." Nevertheless, the loss must be one arising out of the relationship, and not merely from the determination of a contract between them; as where the son was a skilled workman employed at the market rate of wages, it was held that the father had no claim under the Act in respect of the loss of his workman.³

Bramall v. Lees.

The view adopted in *Franklin v. South-Eastern Railway Company* had previously been acted upon by the same Court in the very much stronger case of *Bramall v. Lees*.⁴ A chemist by mistake for tincture of rhubarb sent laudanum, which was administered to a child and caused death. The child was only twelve years old. At the trial of an action, brought by the father for compensation for the death, it was proved that at the time of the

¹ The Scotch law, which was referred to in the argument, is different from the English, and admits of a solatium for wounded feelings, and also for the pain and suffering inflicted on the deceased: *Ersk. Inst. Bk. 3, tit. 1, 13*; *Bell, Principles of the Law of Scotland* (9th ed.), § 2029; *Dow v. Brown*, 6 *Dunlop* 534; *Neilson v. Rodgers*, 16 *Dunlop* 325, 603; *Auld v. Shairp*, 2 *Rettie*, 191; *M'Master v. Caledonian Railway Company*, 23 *Sc. L. R.* 181; *Guthrie Smith, Law of Damages* (2nd ed.), 14.

² (1858) 3 *H. & N.* 211.

³ *Sykes v. North-Eastern Railway Company* (1875), 44 *L. J. C. P.* 191.

⁴ (1857) 29 *L. T. O. S.* 111.

administration of the laudanum the child was living at home getting nothing, and was, pecuniarily, a burden to its parents. Notwithstanding this the plaintiff obtained a verdict; but Crompton, J., doubting whether the plaintiff could recover, a rule was moved for, and granted, as stated by Pollock, C.B., "not so much on the doubt the Court entertain, as from the importance of the question, and there having been, undoubtedly, a view taken by the learned judge which, I believe, he does not now entertain." The rule was, however, afterwards abandoned.¹

The Common Pleas, in *Dalton v. South-Eastern Railway Company*,² expressed their "entire concurrence" with the judgment of the Court of Exchequer in *Franklin v. South-Eastern Railway Company*, that "*legal liability* alone is not the test of injury in respect of which damages may be recovered under Lord Campbell's Act." As to a further question, whether the expenses of the funeral and mourning should be allowed, the Court said: "The subject-matter of the statute is compensation for injury by reason of the relative not being alive; and there is no language in the statute referring to the cost of the ceremonial of respect paid to the memory of the deceased in his funeral or in putting on mourning for his loss." Dalton v. South-Eastern Railway Company.
Funeral and mourning expenses not allowed.

What is "reasonable expectation" of pecuniary benefit from the life of the deceased was again mooted in *Duckworth v. Johnson*.³ A father sued for damages for the death of his son, aged fourteen years, caused by the defendant's negligence. Two years and a half before the accident the boy earned 4s. a week, though at the time he was killed he was not in any employment. A verdict was given for plaintiff. The Court refused a new trial, on the ground that the question of value to the father was a matter to be submitted to the jury. In this case the test is stated to be whether there is "some evidence of a prospect of benefit."⁴ Bramwell, B., however, was reluctant to leave so wide an issue to the jury, "for, if the jury are solely to judge in such matters in every case where a child is killed, it will be difficult to prevent them from giving damages by way of solatium; whereas, if the plaintiff is compelled to give evidence of the value of the child's services and the cost of main-

¹ 29 L. T. (O. S.) 166.

² (1858) 4 C. B. N. S. 296. See, however, per Bramwell, B., in *Osborn v. Gillett*, L. R. 8 Ex. 88, at 99.

³ (1859) 4 H. & N. 653. *Condon v. Great Southern and Western Railway Company*, 16 Ir. C. L. R. 415, is a very similar case. A widow sued for damages upon the death of her son, a boy of fourteen, who had never earned wages, but whose capability was valued at sixpence a day. The Irish Court of Exchequer held that the probability of his earning more and devoting part of his earnings to his mother is evidence to go to the jury upon the question of damages; also that his past filial conduct is evidence.

⁴ Per Watson, B., 4 H. & N. 653, at 659.

taining him, it might keep the matter straight and prevent injustice being done."¹

Pym v. Great
Northern
Railway
Company.

Right of action
not a mere
continuance
of deceased's
right.

In *Pym v. Great Northern Railway Company*,² the facts shewed that the deceased was a man of considerable landed property, which, by his death, went in greatest part to his eldest son. The property was thus undiminished, though the mode of its distribution was affected. An objection was taken, that since had death not ensued from the effects of the accident, deceased could have had no right of action against the defendants in respect of a pecuniary loss, arising only on his death, the action could not be maintained by his representatives, whose right was a mere continuance of that which would have accrued to the deceased if he had lived. This was thus met by Cockburn, C.J. : "The condition that the action could have been maintained by the deceased if death had not ensued, has reference not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect, or default, complained of. Thus, if the deceased had, by his own negligence, materially contributed to the accident whereby he lost his life, as he, if still living, could not have maintained an action in respect of any bodily injury, notwithstanding there might have been negligence on the part of the defendants, the present action could not have been supported. But supposing the circumstances of the negligence to have been such that, if death had not ensued, the deceased might have brought an action in respect of any injury arising to him from it, we are of opinion that his representative may maintain an action in respect of an injury arising from a pecuniary loss occasioned by the death, although that pecuniary loss would not have resulted from the accident to the deceased had he lived."³

Right of action
not for the
benefit of a
class but of
individuals.

Assuming a right of action, it was next contended that, as the deceased was possessed of a fortune, which would not be diminished by his death, and which passed to the class of relatives whom the statute meant to protect, there was no loss caused by his death. The short answer to this, as given in the Exchequer Chamber, is, that the remedy is given, not to a *class*, but to *individuals*; and therefore those of the class who sustain actual

¹ *Chapman v. Rothwell* (1858), E. B. & E. 168, as far as it relates to Lord Campbell's Act, is merely a decision on a pleading point as to whether plaintiff, suing as administrator, could recover without express allegation of pecuniary damage.

² (1862) 2 B. & S. 759, 4 B. & S. 396.

³ 2 B. & S. 759, at 767. In *Seward v. Vera Cruz*, 10 App. Cas. 59, 70, Lord Blackburn described the action under Lord Campbell's Act "as an action which is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent or child, who under the circumstances suffers pecuniary loss by the death."

pecuniary loss may sue, though others of the class are large pecuniary gainers by the death. "The principle which governs these cases," says Erle, C.J., is "to consider whether there was evidence of a reasonable probability of pecuniary benefit to the parties if the death of the deceased had not occurred; and was it lost by reason of that death, caused by the wrongful act, neglect, or default of the defendants? If this were so, then there is a case which the judge must leave to the jury."¹

A distinction was drawn in *Boulter v. Webster*² between expenses caused by *the injury* and by *the death*. *Dalton v. South-Eastern Railway Company*³ had declared that a claim for funeral expenses could not be maintained. In *Boulter v. Webster* it was sought to substantiate a claim for medical expenses incurred during the illness of the child consequent upon the accident. The Court refused to entertain the claim, and, in addition, ruled that the damages recovered under the Act must, in all cases, be in the nature of special damage, and that no action is maintainable upon the Act for merely nominal damages.

This is consistent with the Irish case of *Condon v. Great South and Western Railway Company*,⁴ where it was suggested that any service, however small, such as might, if rendered by a daughter to a parent, enable the parent to sustain an action for her seduction, would constitute a sufficient ground to entitle the plaintiff to damages under Lord Campbell's Act. The Court refused to give "any sanction to that argument," and added: "Between the small amount of service which may be sufficient in many cases to save the plaintiff from a nonsuit on the technical ground on which an action for seduction is still held unsustainable, without some proof of actual services shewing that

¹ 4 B. & S. 396, at 406. Cp. *Beckett v. Grand Trunk Railroad Company*, 13 Ont. A. R. 174; and *St. Lawrence and Ottawa Railroad Company v. Lett*, 11 Can. S. C. R. 422, where it was held that although on the death of a wife caused by the negligence of a railway company, the husband cannot recover damages of a sentimental character, yet the loss of household services accustomed to be performed by the wife which have to be replaced by hired services, is a substantial loss for which damages may be recovered, as is also the loss to the children of the care and moral training of their mother. At 433 Ritchie, C.J., said: "I think the term injury in the statute means substantial injury as opposed to mere sentimental." . . . "I am free to admit that the injury must not be sentimental, nor the damages a mere *solatium*, but must be capable of a pecuniary estimate, but I cannot think it must necessarily be a loss of so many dollars and cents capable of calculation." Gwynne and Taschereau, J.J., dissented, on the ground that pecuniary compensation proportionate to an injury done to a person by such a person being deprived of anything, should be the value expressed in money of the thing of which they have been deprived; and that where a money standard is not accurately applicable, there can be no recovery. The controversy in Canada is settled by *Grand Trunk Railroad Company v. Jennings*, 13 App. Cas. 800, at 803. See also *post*, 225, note 1.

² (1865) 11 L. T. (N. S.) 598.

³ 4 C. B. (N. S.) 296.

⁴ (1865) 16 Ir. C. L. R. 415, at 421.

the female, who had been seduced, was, at the time of the seduction, the plaintiff's servant, and the pecuniary loss which must be proved in an action under Lord Campbell's Act, there is no sort of analogy."

Bourke v.
Cork and
Macroom
Railway
Company.

This doctrine was further expounded in two other Irish cases, *Bourke v. Cork and Macroom Railway Company*,¹ and *Holleran v. Bagnell*.² In the former, the father, a respectable tradesman, whose position made him independent of any earnings his son might have afterwards been competent to gain, sued for the damages for the death of the son caused by the defendants' negligence; the Exchequer Division held him not entitled to recover, on the ground, first, that a reasonable expectation must be shewn that profit would be made by the continuance of life; and secondly that there must also be a reasonable expectation that some part of the profit so made would become the property of the person on whose behalf damages are claimed either as of bounty or of right. "*Bridges v. North London Railway Company*,"³ says Palles, C.B., "and other cases, decide that in determining the preliminary question whether there is evidence to go to the jury in support of any particular proposition, we must take notice of, and, to a certain extent, act upon, the ordinary experiences of human life. Acting upon this experience, my view is, that this boy would have been more likely a source of expense than of profit to his father. But, be this as it may, it is clear that, up to the moment of the unfortunate occurrence in which he met his death, he had never contributed one sixpence to the support of the family. It is equally clear that the position of the father was such as to put him far beyond the necessity of resorting for his support or otherwise to the earnings of his child. The case is one in which there was no moral duty upon the part of the child to contribute any portion of his earnings to the parent or family."

Holleran v.
Bagnell.

In the other case² the child killed was about the age of seven, and the only evidence of pecuniary loss was that she had been in the habit of rendering trifling household services. The language of Morris, C.J., falls somewhat short of that used in *Bramall v. Lees*,⁴ and *Duckworth v. Johnson*.⁵ He states once more what had again and again been laid down that "the loss must be a pecuniary loss, actual or reasonably to be expected, and not as a solatium." The Lord Chief Justice then adds a proposition, eminently reasonable in itself, but which is not found in the

¹ (1879) 4 L. R. Ir. 682; *Johnston v. Great Northern Railway Company*, 26 L. R. Ir. 691.

² 6 L. R. Ir. 333.

³ L. R. 6 Q. B. 377; L. R. 7 H. L. 213.

⁴ 29 L. T. (O. S.) 111.

⁵ 4 H. & N. 653.

English cases : " And there should be distinct evidence of pecuniary advantage in existence prior to, or at the time of, the death. This advantage must be a benefit to the plaintiff." " There is no instance," says the learned judge, " of an action for loss caused to a plaintiff by the death of a person of the tender age of the deceased "—seven years.

The rule suggested by Morris, C.J., that there must be distinct evidence of pecuniary advantage in existence prior to, or at the time of the death (interpreting the term " pecuniary advantage " by the clause " actual or reasonably to be expected ") would go to meet the difficulty pointed out by Bramwell, B., in *Duckworth v. Johnson*.¹ Still the rule, as suggested, can scarcely be reconciled with *Bramall v. Lees*;² for there, though the child was twelve years old, she had never earned anything, and, beyond the mere fact that she was five years older, there do not seem to have been any facts warranting the drawing of an inference more in favour of her ability to earn than in the case of *Holleran v. Bagnell*.

The Irish Court of Exchequer considered the matter again in *Hull v. The Great Northern Railway Company of Ireland*.³ The action was under Lord Campbell's Act, and brought by the plaintiff, a laundress, for the death of her mother, who was killed in a railway accident. Negligence was admitted by the defendants, who traversed plaintiff's pecuniary loss. It was proved that the deceased lived with the plaintiff, by whom she was lodged and maintained; and that the deceased assisted in the laundry, in keeping house and cooking and serving meals. It was not, however, shewn that the value of the services of the deceased exceeded the cost of her support. " I entertain a clear opinion," says Pales, C.B., " that the verdict cannot stand, having regard to the ordinary principles as to *onus* of proof. To maintain the action there must have been pecuniary loss to the plaintiff caused by the death. The existence, therefore, of such loss must be affirmatively established. To do so, it is not sufficient to prove a state of facts which is as consistent with the absence, as with the existence, of such loss. It follows that if that loss depends upon something which may or may not exist, but the existence of which has not been proved, and cannot reasonably be inferred from the facts in proof, the plaintiff must fail; and if

Rule suggested by Morris, C.J., discussed.

Hull v. The Great Northern Railway Company of Ireland.

Pales, C.B.'s judgment.

¹ 4 H. & N. 653.

² 29 L. T. (O. S.) 111.

³ 26 L. R. Ir. 289, per Pales, C. B., at 294. In *Wolfe v. Great Northern Railway Company*, 26 L. R. Ir. 548, Fitzgibbon, L.J., said, at 569, " I accept the Chief Baron's judgment in *Hull v. The Great Northern Railway Company* as to the *onus* of proof . . . but I cannot admit with Murphy, J., that it overruled *Duckworth v. Johnson*. It could not do so; and though Murphy, J., disapproved of *Duckworth v. Johnson*, the Chief Baron distinguished it, and only went so far as to share the doubt expressed by Lord Bramwell."

the fact in question be one peculiarly within the knowledge of the plaintiff and not of the defendants, the difficulty of inferring it when not directly proved is increased." "I doubt whether *Duckworth v. Johnson* is an authority in favour of the plaintiff. There the boy's wages were fixed—four shillings a week. The alleged vagueness was in the value of his support; but if the gross earnings of the family were proved (as possibly they may have been, although it does not appear in the report), the decision of the three judges who thought the evidence sufficient would be correct. For myself, however, taking the evidence in that case as reported, I share the doubt expressed by Lord Bramwell in his judgment; and if the decision can be pressed to the extent of sustaining the present verdict, I must, with great deference, decline to follow it." "Following the principle acted upon in this Court in *Bourke v. Cork and Macroom Railway Company*,¹ I hold that the evidence at the trial was insufficient to sustain the plaintiff's case, and that the verdict must be set aside. But for *Duckworth v. Johnson* I should be of opinion that the verdict should be entered for the defendants; but as there is some doubt whether the omission to give evidence of the pecuniary value of the services was not in consequence of that decision, which was to a certain extent recognized in this Court in *Condon v. Great Southern and Western Railway Company*,² I think that the plaintiff ought not to be concluded by it, and that consequently there should be a new trial."

Wolfe v. Great Northern Railway Company.

In the subsequent case of *Wolfe v. Great Northern Railway Company*,³ Fitzgibbon, L.J., said, "I think the true question is stated by the Chief Baron in *Hull v. The Great Northern Railway*, viz.,—has the plaintiff sustained the primary *onus* of proof? If he has, the *onus* of rebutting it is shifted to the defendants. This question must be determined in each case on its own facts, and authorities are material only as instances." The facts shewed that a child of ten who had been negligently killed on the defendants' line did "the work of the house" for her father and mother; and there was further evidence that the parents were obliged to hire a substitute at three-and-sixpence a week and her keep. This the six judges of the Irish Court of Appeal held to be evidence sufficient to go to a jury, and which would justify them in concluding that the services were of pecuniary value exceeding the cost of maintenance and education. Any expressions then in *Duckworth v. Johnson*⁴ which go to lay down a rule that in every case where a child is killed, the

¹ 4 L. R. Ir. 682.

² 26 L. R. Ir. 548, 566.

³ 16 Ir. R. C. L. 415.

⁴ 4 H. & N. 653.

jury are to determine whether damages have been sustained, must be taken to be seriously discredited by the doubts both there and in the succeeding cases.

In what circumstances services are to be considered as rendered gratuitously or for remuneration has been made the subject of decision in a Scotch case,¹ which indicates that the question of what is to be held remuneration depends, not upon any general presumption, but on the consideration of the whole surroundings in which the services are performed; if any general presumption in favour of services exist, it is at best a weak one, and easily rebutted by indications that the services are intended to be gratuitous.

A somewhat different aspect of the question just discussed was treated in *Hetherington v. North-Eastern Railway Company*,² where a father, fifty-nine years of age and infirm, sued for the death of a son who had contributed to his support five or six years previously, while the father had been out of health, and who had not done so since. "I have always," said Field, J., "understood the rule laid down by the decisions in such cases to be that there must have been a reasonable expectation of pecuniary advantage to the relation from the life of the deceased. The defendants' counsel alleges that there is no evidence of any such reasonable expectation in this case. I cannot come to that conclusion."

The elements of "pecuniary loss" were considered in *Rowley v. London and North-Western Railway Company*.³ The plaintiff sued, for the benefit of the mother, wife, and children of the deceased, for negligence in occasioning his death. The mother was entitled to an annuity of £200 during the joint lives of herself and the deceased, secured by the personal covenant of the deceased. In summing up at the trial, Kelly, C.B., told the jury that "they might, if they thought proper, calculate the damages which the mother of the deceased was entitled to recover, by ascertaining what is the sum of money which would purchase an annuity of £200 for a person sixty-one years of age (the age of the mother), according to the average duration of human life; that, according to the Carlisle Tables, it had been stated that the average duration of the life of a man in good health and vigour, who had arrived at the age of forty years, [the age

¹ *Thomson v. Thomson's Trustees*, 16 Rettie 333, at 335, per Lord Shand. See a discussion on "reasonable expectation of benefit," *Mason v. Bertram*, 18 Ont. R. 1. "What," says Fitzgibbon, L.J., in *Wolfe v. Great Northern Railway Company*, 26 L. R. Ir. 548, at 566, "is the 'pecuniary damage' of which the plaintiff must give evidence? In my opinion damage capable of being *estimated in money* and of being *compensated by money*."

² (1882) 9 Q. B. D. 160, a case under the Employers' Liability Act, 1880.

³ (1873) L. R. 8 Ex. 221.

of the deceased] is twenty-seven years and a fraction ; and that they might, if they thought proper, take as a guide in their calculations of the damages recoverable for the wife and children that such was, according to these tables, the probable duration of the life of a man of forty years of age in the circumstances in which the deceased was."

Errors alleged. To this direction, so far as it referred to the case of the mother, three errors were assigned. First, that she had lost an annuity for the joint lives of herself and her son, and that an annuity for her own life only would be of considerably greater value. An oversight to this extent was admitted, and the matter was treated as an obvious slip, which must have been corrected had it been pointed out.

Value of annuity on an average life. Secondly, that the value of an annuity would be that on an average life ; and the jury ought to have been told to make an allowance for any defect in the health of the life.

On this point, Blackburn, J., delivering the judgment of the majority of the Court,¹ upholding the learned judge's direction, said : " The particular life on which an annuity is secured may be unusually healthy, in which case the value of the annuity would be greater than the average ; or it may be unusually bad, in which case the value would be less than the average ; . . . we think the jury might properly be directed to consider the lives in question as average lives, unless there was some evidence to the contrary ; and if there was evidence to the contrary, the party excepting ought to have placed it on the bill of exceptions." That is, there being evidence of damage to go to a jury, it is not a misdirection to tell them they must assume it is a normal and not an abnormal case. Honyman, J., dissented from this, without giving his reasons.

Value must be on Government or other very good security. Thirdly, that the value of the annuity spoken to in the evidence was the value of an annuity on Government or other very good security ; and that the annuity lost was that secured by the personal covenant of the deceased, and therefore of much less value. This also was allowed.

Further exception as to the probable duration of the man's life. There was further an exception that the learned judge should not have directed the jury that they " might, if they thought proper, take as a guide, in the calculation of the damages recoverable for the wife and children of the deceased, that the

¹ Blackburn, Keating, Grove, and Archibald, JJ.

² In *Vicksburg, &c., Railroad v. Putnam*, 118 U.S. (11 Davis) 545, Gray, J., says, at 556, " Life and annuity tables are framed upon the basis of the average duration of the lives of a great number of persons. But what the jury in this case had to consider was the probable duration of the plaintiff's life, and of the injury to his capacity to earn his livelihood."

probable duration of the life of a man of forty years of age in the circumstances in which the deceased was is twenty-seven years, according to the Carlisle Tables." Blackburn, J., and the majority of the Court construed the meaning of the judge, in thus directing the jury, to be that this was an element to be taken into consideration by them with the rest of the evidence; and held that if so, it was unexceptionable. Brett, J., dissented,¹ on the ground that the invariable direction to juries, from the time of the earliest cases on the statute until then had been "that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, *under all the circumstances, a fair compensation.*" He then continues: "I have a clear conviction that any verdict founded on the idea of giving damages to the utmost amount, which would be an equivalent for the pecuniary injury, would be unjust. Founding my opinion on that conviction, on the declaration of it by Parke, B.,² and on the ordinary directions of judges, which directions have not been for years challenged, I conclude that the direction that I have enunciated is the legal, and only legal, direction. A direction which leaves it open to the jury to give the present value of an annuity equal in annual amount to the income lost for a period supposed to be equal to that for which it would have continued if there had been no accident is a direction, as it seems to me, leaving it open to a jury to give the utmost amount which they think is equivalent for the pecuniary mischief done, and such a direction is a misdirection according to law."³ Brett, J., was therefore of opinion that evidence of the present value of an annuity was "necessarily misleading and legally irrelevant," and should not have been admitted.

Majority of the Court held that the probable duration by actuaries' tables was an element for the consideration of the jury. Brett, J.'s, dissent.

The reason why the direction which Brett, J., sets out is

Grounds of Brett, J.'s, dissent discussed.

¹ L. R. 8 Ex. 221, at 231. Possibly the great mercantile experience of the learned judge suggested the two kinds of indemnity obtainable under a contract of insurance. See 3 Kent, Comm. 335; Pitman v. Universal Marine Insurance Company, 9 Q. B. Div. 192.

² Armsworth v. South-Eastern Railway Company, 11 Jur. 758. Reference to the case will show that Parke, B., was speaking of "an equivalent for the mischief done," in the sense of full compensation, not only for actual loss, but for injured feeling. *E.g.*, "No sum of money could compensate a child for the loss of its parent." This is even more obvious from the sentence, "Scarcely any sum could compensate a labouring man for the loss of a limb." If it were merely the calculation of the money loss, this would not be true. The *Nisi Prius* ruling of Parke, B., and the considered judgment of Brett, J., oscillate between the two meanings.

³ Another consideration in favour of the rule which he considered to be law is thus stated by Brett, J., in an earlier part of the same judgment: "If juries do give such damages, poor defendants will be ruined, and the defendants most liable to such actions will not be able to carry on their business upon the same terms to the public as now." Are, then, rich wrongdoers to be more lightly dealt with, that poor wrongdoers may not suffer beyond measure? or is the fear that large employers "will not be able to carry on their business upon the same terms to the public as now" a legal deterrent from compensatory pecuniary damages?

average duration of the life of a man in good health and vigour who had arrived at the age of forty years is twenty-seven years and a fraction ; and that they might, if they thought proper, take as a guide, in their calculations of the damages recoverable for the wife and children, that such was, according to these tables, the probable duration of the life of a man of forty years of age in the circumstances in which the deceased was." Blackburn, J., giving the judgment of the majority,¹ disallowed the exception that was taken to this. "We think that this cannot be construed as meaning more than that this was an element to be taken into calculation by the jury with the rest of the evidence ; and, if so, it is unexceptionable." Brett, J., dissented, as the direction left "it open to a jury to give the utmost amount which they think is equivalent for the pecuniary mischief done, and such a direction is a misdirection according to law. And such, in my opinion, was the direction in the present case of the Lord Chief Baron."² Brett, J.'s, view did not prevail.

James, L.J.'s, view in Phillips v. London and South-Western Railway Company.

Further, this statement of the law by Brett, J., was called in question in the appeal on the first trial in Phillips v. London and South-Western Railway Company.³ Brett, L.J., there asks Sir John Holker during the argument, "What do you say would have been the correct direction to the jury in Rowley's case ?" The answer was that the jury must take into account the value of an annuity during the joint lives of the covenantor and covenantee, having regard to the mode in which it was secured, and to all the circumstances of the covenantor. And James, L.J., subsequently says :⁴ "The proper direction to the jury, as it seems to me, would have been to tell them to calculate the value of the income as a life annuity, and then make an allowance for its being subject to the contingencies of the plaintiff retiring, failing in his practice, and so forth." And presently, turning to the facts of the case before him, the Lord Justice said : "I think that what Field, J., meant to say was : 'So far as the injury results in actual pecuniary loss, you must give the plaintiff full compensation for that loss ; but so far as he is entitled to damages for the suffering of being made a helpless cripple, you cannot proceed upon the principle of making full compensation.'" In giving the judgment of the Court, in which Brett, L.J., concurred without adding anything, James, L.J., says :⁵ "You are to consider what his income would probably have been, how long that income would probably have lasted, and you are to take into consideration all the other contingencies to which a practice is liable."

Bramwell, L.J.'s, view in

In the second case in the Court of Appeal, Bramwell, L.J.,

¹ L. R. 8 Ex. 221, at 228. ² at 231. ³ 5 Q. B. D. 78, at 84. ⁴ at 84. ⁵ at 87.

very clearly expresses the same view:¹ "I have tried as judge more than a hundred actions of this kind, and the direction which I, in common with other judges, have been accustomed to give to the jury has been to the following effect: 'You must give the plaintiff a compensation for his pecuniary loss, you must give him compensation for his pain and bodily suffering. Of course, it is almost impossible² for you to give to an injured man what can be strictly called a compensation,³ but you must take a reasonable view of the case, and must consider, under all the circumstances, what is a fair amount to be awarded to him.' I have never known a direction in that form to be questioned. I may take the common case of a labourer receiving an injury which has kept him out of work for perhaps six months. His evidence may be that before the time of the accident he was earning twenty-five shillings a week, that during twenty-six weeks he has been wholly incapacitated for work, that for ten weeks afterwards he has been able to earn only ten shillings a week, and that he will not get into full work again for twenty weeks. The plaintiff will be entitled to twenty-five shillings for each of the twenty-six weeks, and to fifteen shillings for each of the ten and twenty weeks.⁴ He is also entitled to some amount for his bodily sufferings and for his medical expenses; and in this manner the compensation to be awarded to him is estimated."

Phillips v.
London and
South-Western
Railway
Company.

To these authorities must be added the authority of Lord Blackburn. Speaking in the House of Lords in *Livingstone v. Rawyards Coal Company*,⁵ he says: "I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation. That must be qualified by a great many things which may arise—such, for instance, as by the consideration whether the damage has been maliciously done, or whether it has been done with full knowledge that the person doing it was doing wrong. There could be no

Lord Blackburn's view in the House of Lords in *Livingstone v. Rawyards Coal Company*.

¹ 5 C. P. Div. 280, at 287.

² The Lord Justice does not say that it is not legal, and that the elements which would enable an approximation to it are not admissible evidence; he says merely, it is "almost impossible" to do so.

³ I.e., to restore to him the possibilities of the future.

⁴ There must be deducted from this, however, to make it strictly and theoretically correct, the possibility of some occurrence that might prevent his earning the money, as is done in the case of the annuity.

⁵ 5 App. Cas. 25, at 39.

doubt that there you would say that everything would be taken into view that would go most against the wilful wrongdoer—many things which you would properly allow in favour of an innocent mistaken trespasser would be disallowed as against a wilful and intentional trespasser on the ground that he must not qualify his own wrong, and various things of that sort.”¹

Conclusions as to Brett, J.'s contention.

The weight of authority therefore does not support Brett, J., in holding, first, that the fully calculated equivalent of the pecuniary loss sustained by the person on whose behalf the action is brought cannot be recovered—that is, understanding by an equivalent for pecuniary loss the sum that represents the present worth as nearly as it may be estimated, subject to all deductions—*e.g.*, the probability of the non-continuance of life, or the cessation of its profitable employment in any way. Secondly, it is again against Brett, J.'s, proposition that a direction which leaves it open to the jury to give the present value of an annuity equal in annual amount to the income lost for a period supposed to be equal to that for which it would have continued, if there had been no accident, is a misdirection. It would, however, seem to be a misdirection to leave the matter to the jury without a caution to them that the tender of evidence of the present value of the annuity can be construed as meaning no more than that this is an element to be taken into calculation with the rest of the evidence. And, thirdly, it negatives Brett, J.'s, remaining proposition that any evidence given solely for the purpose of enabling a jury to make a calculation as to annuity value, with a view to damages, is inadmissible.

The view of the Supreme Court at the United States accords with the English rule.

The conclusion arrived at by the most authoritative Court in the United States is in accord with the preponderance of English authority. In *Vicksburg Railroad Company v. Putnam*² the rule is laid down that for a personal injury a plaintiff is entitled to recover compensation so far as it is susceptible of an estimate in money for the loss and damage caused to him by the defendants' negligence, including not only expenses incurred for medical attendance and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of his capacity of earning by the wrongful acts or defaults of the defendants. Further, that standard annuity tables are admissible as evidence of the capital value of loss, though they are subject to observations of the same species we have been dis-

¹ See the remarks as to damages by De Grey, C.J., in *Fabrigas v. Mostyn*, 20 How. St. Tr. 175, 181, on motion for new trial on the ground of excessive damages.

² 118 U. S. (11 Davis) 545, at 554; *District of Columbia v. Woodbury*, 136 U. S. (29 Davis) 450, at 466; *The Atlas*, 93 U.S. (3 Otto) 302.

cussing in the English cases which disentitle them from being taken as absolute guides by the jury.¹

The pecuniary loss caused to the relatives, from failure of a life income by reason of death, is often lessened or prevented altogether by an insurance having been effected on the life of the deceased. In *Bradburn v. Great Western Railway Company*,² a case under the general law of negligence, Bramwell, B., expressed himself "dismayed" at the proposition that the damages that could be recovered from a wrongdoer should be diminished by the providence of the injured person in insuring; and he cited *Dalby v. India and London Life Assurance Company*³ as an authority that the injured person does not recover for the accident, but on the contract, and that his right arises as a *quid pro quo* by reason of the payment of the premiums.

Effect of insurance upon a claim under Lord Campbell's Act.

Under Lord Campbell's Act, however, this is not so; for there the damages are to be a compensation to the family of the deceased equivalent to the pecuniary benefits which they might have reasonably expected from the continuance of life. If, therefore, the person claiming damages were put by the death of his relative into possession of a large estate, there is no loss; he is a gainer by the event; and similarly whatever comes into the possession of the family who have suffered by the death of their relative, by reason of his death, must be taken into account.⁴ This is in complete accordance with the law laid down at *Nisi Prius* in the case of *Hicks v. Newport, Abergavenny, and Hereford Railway Company*,⁵ by Lord Campbell, who directed a

¹ Cp. *The Argentino*, 13 P. D. 61, 191, 14 App. Cas. 519. In *District of Columbia v. Woodbury*, 136 U.S. (29 Davis) 450, evidence that a medical man had contributed to scientific journals, though he got no pay for doing so, and which contributions he was obliged to discontinue as a consequence of injuries, caused by appellants' negligence, was held admissible as tending to show the extent of the physical and mental injuries he had received.

² L. R. 10 Ex. 1; approved *Jebsen v. East and West India Dock Company*, L. R. 10 C. P. 300. See also *Clarke v. Blything* (Hundred of), 2 B. & C. 254. The principle of law is that, where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against, or reimbursed himself for, the loss. *Simpson v. Thomson*, 3 App. Cas. 279, 284; *Mobile and Montgomery Railroad Company v. Jurey*, 111 U. S. (4 Davis) 584; *Regan v. New York and New England Railroad Company*, 60 Conn. 124; 25 Am. St. R. 306. In *Morison v. Bartolomeo*, 5 Macph. 848, which was an action for collision, where the pursuers had been paid insurance, but had also procured an assignment by the underwriters of all their rights, as against the defenders, the fact that pursuers had been paid insurance money was held not admissible to reduce liability. *Yates v. Whyte*, 4 Bing. N. C. 272, following *Mason v. Sainsbury*, 3 Doug. 60.

³ 15 C. B. 365.
⁴ See per Bramwell, B., *Bradburn v. Great Western Railway Company*, L. R. 10 Ex. 1, at 3. *South Staffordshire Tramways Company v. Sickness and Accident Assurance Association* (1891), 1 Q. B. 402. There is a note to *Paul v. Travellers' Insurance Company*, 8 Am. St. R. 758, at 763-766, "What is death by accidental means?"

⁵ Only reported in a note in 4 B. & S. 403. The American cases differ. They are collected in the judgment of Hagarty, C.J., *Beckett v. Grand Trunk Railway Company*, 13 Ont. App. 174 at 181, affd. 16 Can. S. C. R. 713. Cp. *Farmer v. Grand Trunk Railway Company*, 21 Ont. R. 299.

Direction of
Lord Campbell,
C.J., in *Hicks*
v. Newport,
Abergavenny,
and Hereford
Railway
Company.

jury: "If there were no insurances what would be the amount? Well, then, if there be an insurance for £1000 by some company that insured him (the deceased) against accident, by railways, and they being entitled to receive £1000 upon that policy, it is quite clear that there ought to be a deduction from the aggregate amount in respect of that £1000. Then with regard to the policies upon his life, independently of accident, if you allow any deduction (and I think you will probably consider that some deduction ought to be allowed), it will only be in respect, I should think, of the premiums that would be paid by the family, or which would have been paid by himself if this fatal accident had not happened."

The passage is obscure, but Lord Campbell's meaning seems to be that, with regard to an insurance against accidents by railways, the whole of such insurance should be deducted from the amount that the jury would have considered recoverable had there been no assurance. With regard to ordinary life assurance, however, the gross income of the deceased should first be ascertained; from which should then be deducted all outgoings, including the premium on the life policy; after having thus ascertained the net income, the loss the family would sustain by reason of being deprived of it must be computed for the number of years the deceased would probably have earned it, taking into account the ordinary expectation of life and deceased's continued ability to earn the same income, and other like circumstances.¹

The difference indicated by Lord Campbell between the two cases of insurance is due probably to the fact that insurances against accidents by railways secure a payment that is only made on the happening of the injury in respect of which compensation is claimed; the payment is therefore, so far as it goes, pure pecuniary gain; since the happening of an accident is the condition precedent to the obtaining the insurance, and if no accident happened no sum at all would be payable. Life insurance, on the other hand, secures a sum payable absolutely, though at an uncertain time; and the fact that the injury makes the time of the payment certain is no ground for diminishing the compensation payable in respect of the injury; since the payment of the sum is in no way dependent on the happening of the injury, though the time of payment is accelerated by it.

The suggestion of Lord Campbell in *Hick's* case, that the benefit the widow derived from the acceleration of payment might be countervailed by deducting from the estimate of the future earnings of the deceased the amount of the premiums

¹ Per Burton, J.A., *Beckett v. Grand Trunk Railway Company*, 13 Ont. App. 174, at 187, on appeal 16 Can. S. C. R. 713. See *Railway Passengers Assurance Companies Act*, 1864, 27 & 28 Vict. c. cxxv. s. 35.

which, if he had lived, he would have had to pay out of his earnings for the maintenance of the policy, was approved by the Privy Council in *Grand Trunk Railway Company of Canada v. Jennings*;¹ where it was also held that the receipt of insurance money is merely one of the circumstances to be left to the jury in estimating the pecuniary loss suffered by the claimants from the death; and such payment of insurance money is not to be regarded as a deduction to be made from the full amount awarded. The jury is not to arrive at a sum sufficient to compensate the claimants, and from that to deduct insurance money paid to them, but is to consider the receipt of insurance money amongst the elements determining them in fixing the sum they award.² What elements are to be considered may be indicated by Patterson, J.A.'s, distinction between property acquired by the death to which otherwise the successor had no title, and property the possession of which has been merely accelerated. In the latter case he is of opinion the deduction spoken of by Lord Campbell should be in respect of the acceleration alone, and not of the value of the estate.

Lord Campbell's Act, we have seen, only enables those damages to be recovered which arise from pecuniary loss sustained by the representatives consequent on the death, through the defendants' negligence, of him as whose representatives the plaintiffs sue. In *Barnett v. Lucas*,³ after damages had been recovered under Lord Campbell's Act, an action was commenced by the widow of the deceased, as administratrix of her husband, to recover damages for injuries caused by the same negligence to the "personal chattels" of the deceased. The principle on which the Irish Court of Common Pleas decided in favour of the plaintiff was that the action under Lord Campbell's Act is brought by the personal representative—not for the estate, but as a trustee for those beneficially entitled; and that an injury to the personal estate gives a distinct cause of action to the personal representative not to be confounded with the statutable right to recover pecuniary loss sustained through the death. The decision of the Common Pleas was upheld by the Exchequer Chamber, on the ground that the cause of action under Lord Campbell's Act could not be the same with that brought on behalf of the estate by the administratrix, since damages recovered under Lord Campbell's Act could never be assets of the deceased. Fitzgerald, B., dissented, on the grounds, first, that there was but one cause of action—

*Grand Trunk
Railway
Company of
Canada v.
Jennings.*

Damages
recoverable in
respect of the
personal estate
subsequent to
recovery under
Lord Camp-
bell's Act.
*Barnett v.
Lucas.*

Dissent of
Fitzgerald, B.,
in the Irish
Exchequer
Chamber.

¹ 13 App. Cas. 800.

² *Beckett v. Grand Trunk Railway Company*, 13 Ont. App. 174, at 198.

³ (1870) Ir. R. 5 C. L. 140, in the Irish Ex. Ch. Ir. R. 6 C. L. 247. As to Scotch Law, see *Wood v. Gray* (1892), App. Cas. 576.

viz., the default of the defendants; of which the injury to the chattels and the injury to the person, are but different aspects, and do not constitute independent rights of suing; secondly, that Lord Campbell's Act, as interpreted by *Read v. Great Eastern Railway Company*,¹ gave no new right of action, and therefore a second action was incompetent. "It is the same cause of action sued upon with two inconsistent assumptions—viz., that it was independently of the statute determined by death, and that it continued independently of the statute notwithstanding death." With the omission of the word "inconsistent" this might well happen. The action for the injury to the estate undoubtedly continued independently of the statute, notwithstanding death;² while, independently of the statute, with equal certainty no executor or administrator could maintain an action for the loss of life of his testator or intestate.³

Meaning of
"same cause
of action."
*Read v. Great
Eastern
Railway.*

In *Read v. Great Eastern Railway Company*,⁴ Blackburn, J., says: "The principles on which the damages are to be assessed are new, as is correctly said in *Blake v. Midland Railway Company*,⁵ and *Pym v. Great Northern Railway Company*;⁶ but the action is not new, in the sense that there is an independent cause of action vested in the representatives of the deceased in their own right." Lush, J., further explains this as meaning, "The object of the Legislature was not to make the wrongdoer pay damages twice, or to give the representatives of the deceased a new action, but to give a right of action to the representative when the deceased had not obtained compensation, and when there was at the time of the death a subsisting cause of action which the maxim, *Actio personalis moritur cum persona*, prevented from being enforced." And in *Haigh v. Royal Mail Steam Packet Company*,⁷ Brett, M.R., delivering the judgment of the Court of Appeal, said: "It is clear the executors can only recover if the deceased man could have recovered supposing that everything did happen to him which, had he not been killed, would have entitled him to bring an action."

In the former of these cases the statement that there was no

¹ 9 B. & S. 714.

² *Wheatley v. Lane*, 1 Wms. Saund. 216; 1 Wms. Notes to Saund. 239.

³ *Armsworth v. South-Eastern Railway*, 11 Jur. 758.

⁴ 9 B. & S. 714, at 719. The law in Lower Canada, holding that under the Code of 1866 the action analogous to that under Lord Campbell's Act is one independent of the deceased, is set out in *Robinson v. Canadian Pacific Railway Company* (1892), App. Cas. 481. The English cases are fully considered in the Supreme Court of Canada, 14 Can. S. C. R. 105. Cp. *Zimmer v. Grand Trunk Railway Company of Canada*, 19 Ont. App. 693.

⁵ 18 Q. B. 93, at 110.

⁶ 4 B. & S. 396, at 406.

⁷ 52 L. J. Q. B. 640. As to the law apart from Lord Campbell's Act, see *McCawley v. Furness Railway Company*, L. R. 8 Q. B. 57.

new right of action was in connection with the negation of the assumed right of the representatives to recover after satisfaction had been made in the lifetime of the deceased to him personally; and in the latter case the statement was made where the deceased had contracted away the right to recover for injuries or death.

In *Blake v. Midland Railway Company*,¹ Coleridge, J., says; *Blake v. Midland Railway Company.*
“This Act does not transfer this right of action to his representative, but gives to the representative a totally new right of action on different principles.” This is in answer to the contention that the deceased if alive could have recovered a solatium, and, therefore, so could his representatives on his death. And in *Pym v. Great Northern Railway Company*,² in the Exchequer Chamber, Erle, C.J., said: “The statute gives to the personal representative a cause of action beyond that which the deceased would have if he had survived, and based on different principles.” That again was in answer to a contention that, as the deceased was possessed of a fortune which would not be diminished by his death, he could not have sued for anything besides his personal suffering and the pecuniary loss in consequence.

The decisions, therefore, are not inconsistent. Their effect *Decisions not inconsistent.*
seems to be, that while the representatives may be altogether defeated of their action by the conduct of the deceased—as if, for example, he were guilty of contributory negligence,³ or in any way had so conducted himself, that, had he survived, he would have disentitled himself to bring an action for personal injuries, the action which they may maintain, is not the mere continuation of the deceased's right, but an action he could never himself have brought, and one peculiar to them as his representatives and not arising till his death. The historical antecedents are the same as they are in cases of personal injury; the subsequent direction the right of action takes before it fructifies is entirely new. A reference to the preamble of Lord Campbell's Act may help to clear up this point. It is thus expressed: “Whereas no action by law is now maintainable against a person who, by his wrongful act, neglect, or default, may have caused the death of another person; and it is oftentimes right and expedient that the wrongdoer in such a case should be answerable in damages for the injury so caused by him.” The wrong to be remedied is the escape of a person, who, by his wrongful act or default, has caused the death of another person, from answering in damages for the injury—not primarily the loss to the survivors. The

¹ 18 Q. B. 93, at 110.

² 4 B. & S. 396, at 406.

³ *Tucker v. Chaplin*, 2 C. & K. 730.

damages are to be paid to them, and to be assessed on an estimate of their pecuniary loss; but the wrong is the death, coupled with immunity from legal liability for compensation. Contributory negligence removes the liability for the wrong by eliminating the first element in the cause of action; payment of compensation preceding the decease of the injured person, or a valid contract to waive the right to compensation in the event of injury or death, eliminates the second. In so far as these antecedent circumstances—common to the right of action possessed by the injured man if he survive, and to his representatives if he die from the effect of his injuries—are at the basis of both, there is no new right of action; and that in the sense in which the cases so holding are to be understood; while, in so far as the representatives have a right arising on the death from injury through negligence, the right is entirely a new right, of which, previous to Lord Campbell's Act, there was no precedent in the law.

Lord Selborne
in *Seward v.*
The Vera Cruz.

This is apparent from what Lord Selborne says in *Seward v. The Vera Cruz*;¹ "Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim, *Actio personalis moritur cum personâ*; because the action is given in substance, not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor. And not only so, but the action is not an action which he could have brought if he had survived the accident, for that would have been an action for such injury as he had sustained during his lifetime, but death is essentially the cause of the action." Or, as Lord Blackburn says,² an action "new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child who under such circumstances suffers pecuniary loss by the death."

Effect of the
decision in
Read v. Great
Eastern
Railway
Company.

The decision of *Read v. Great Eastern Railway Company*³ leaves open the question whether the cause of action sued on in *Barnett v. Lucas* was the same, in the sense in which alone the question was material, as that for which damages had been previously recovered. What it decides is that damages cannot be recovered independently of the deceased, or, rather, antagonistically to him; and that where the deceased either voluntarily or involuntarily has placed himself in a position that, if he had survived, he could

¹ 10 App. Cas. 59, at 67.

² *L. c.* at 70.

³ 9 B. & S. 714.

not bring an action for personal injury, at his death no new right of action is conferred to replace that which through his own conduct has never arisen or has been extinguished. But it left untouched the question whether, assuming the deceased had left the rights which were united in him unaffected, they were capable of disjunction by his death and of being sued on separately.

*Brunsdon v. Humphrey*¹ decides this in the affirmative. A cabman recovered damages for injury caused, by the defendant's negligence, to his cab. He subsequently commenced another action claiming damages for personal injuries sustained through the same negligence. It was held by the Court of Appeal, overruling the Divisional Court, Lord Coleridge dissenting, that he could maintain the action; Bowen, L.J., observing, "The real test is not, I think, whether the plaintiff had the opportunity of recovering in the first action what he claims to recover in the second;" and Brett, M.R., suggests as a test—though not an exclusive test—the consideration "whether the same sort of evidence would prove the plaintiff's case in the two actions."²

Brunsdon v. Humphrey decides the point left in doubt in *Read v. Great Eastern Railway Company*.

Loss to the personal estate was the gist of the action in *Potter*

¹ (1884) 14 Q. B. Div. 141. See *Serrao v. Noel*, 15 Q. B. D. 549; *Clarke v. Yorke* 52 L. J. Ch. 32; *Stevenson v. Pontifex*, 15 Rettie 125.

² Lord Coleridge, C.J., dissented on the ground that "it seems to me a *subtlety*, not warranted by law, to hold that a man cannot bring two actions if he is injured in his arm and in his leg, but can bring two if, besides his arm and leg being injured, his trousers which contain his leg, and his coat-sleeve which contains his arm, have been torn." Lord Coleridge, C.J.'s, dissent examined.

The following quotation from Mr. John Stuart Mill seems in point: "The last of the modes of erroneous generalisation to which I shall advert is that to which we may give the name of False Analogies. This fallacy . . . consists in the misapplication of an argument which is at best only admissible as an inconclusive presumption where real proof is unattainable. An argument from analogy is an inference that what is true in a certain case is true in a case known to be somewhat similar, but not known to be exactly parallel, that is, to be similar in all material circumstances. An object has the property B; another object is not known to have that property, but resembles the first in a property A not known to be connected with B; and the conclusion to which the analogy points is that this object has the property B also. . . . Now, an error or fallacy of analogy may occur in two ways. Sometimes it consists in employing an argument . . . with correctness indeed, but overrating its probative force. . . . There is another mode of error in the employment of arguments of analogy "more properly deserving the name of fallacy; namely, when resemblance in one point is inferred from resemblance in another point, though there is not only no evidence to connect the two circumstances by way of causation, but the evidence tends positively to disconnect them. This is properly the Fallacy of False Analogies" ("Logic" (4th ed.), vol. ii. book v. 358-360). To reason from proximity in place to identity of nature is a fallacy of false analogy. If direct authority is wanted, there are the words of Lord Bramwell in *Darley Main Colliery Company v. Mitchell*, 11 App. Cas. 127, at 144: "It is a rule that, when a thing directly wrongful in itself is done to a man, in itself a cause of action, he must, if he sues in respect of it, do so once and for all. As, if he is beaten or wounded, if he sues he must sue for all his damage, past, present, and future, certain and contingent. He cannot maintain an action for a broken arm and subsequently for a broken rib, though he did not know of it when he commenced his first action. But if he sustained two injuries from a blow, one to his person, another to his property, as, for instance, damage to a watch, there is no doubt that he could maintain two actions in respect of one blow. I may apply the test I mentioned in the argument. If he became bankrupt, the right in respect of the watch would vest in his trustee; that for damage to his person would remain in him. Lord Esher, M.R., also, in *Macdougall v. Knight*, 25 Q. B. Div. 1, at 8, speaking of *Brunsdon v. Humphrey*, says: "In that case

Based on a false analogy.

Lord Bramwell's dictum.

Loss to
personal estate,
Potter v.
Metropolitan
District
Railway
Company.

*v. Metropolitan District Railway Company.*¹ The wife was injured by the negligence of the defendant railway company; the husband commenced an action for loss of service and expense in nursing, and "loss of profit he would otherwise have made in his business," and died during the pendency of the action. The wife then entered a suggestion of his death on the record, and the action was proceeded with in her name alone: the only question of damage inquired into was what accrued to the plaintiff personally, and not what was sustained by the testator by reason of the injury to his wife. There was a verdict for the plaintiff, with £1000 damages. An action was then commenced by the plaintiff as executrix for the recovery of the damage sustained by her testator's estate. On demurrer both the Court of Exchequer and the Exchequer Chamber held the action maintainable.

Bradshaw v.
Lancashire
and Yorkshire
Railway
Company.
Grove, J.'s,
opinion.

In *Bradshaw v. Lancashire and Yorkshire Railway Company*,² the husband of the plaintiff, who sued as executrix, was injured in a railway accident, and subsequently died from the effects. Grove, J., thus states the question raised: "Does the fact that, in this case, besides the injury to the estate, the testator's death has likewise resulted from the breach of contract, make any difference, or does the fact that provision has been made in such cases for compensation in respect of the death to certain relatives by Lord Campbell's Act take away any right of action that the executrix would have had but for that Act?" He answers it in the following words: "It does not seem to me that the Act has that effect, either expressly or by necessary implication. The intention of the Act was to give the personal representative a right to recover compensation as a trustee for children or other relatives left in a worse pecuniary position by reason of the injured person's death, not to affect any existing right belonging to the personal estate in general. There is no reason why the statute should interfere with any right of action an executor would have had at common law. In the case of such right of action he sues as legal owner of the general personal estate which has descended to him in course of law; under the Act he sues, as trustee in respect of a different right altogether, on behalf of particular persons desig-

there were two separate admitted legal rights of the plaintiff which were infringed—a personal right and a right to have his property uninjured. These are distinct rights, and the jury cannot, in dealing with one case, consider the damages in the other, for the two cases involve different rights and are affected by distinct rules as to assessing damages. That case does not apply to the present, and it is no authority for holding that if there be an actionable injury to the person one action may be brought for injury to one part of the body, and another action for injury to another part. That is not the rule to be derived from the case, and was never intended to be, and it has not been put forward by text writers, or treated in any subsequent case as following from the decision."

¹ (1874) 30 L. T. (N.S.) 765, in the Ex. Ch. 32 L. T. (N. S.) 36.

² (1875) L. R. 10 C. P. 189; followed and approved *Daly v. Dublin, Wicklow, and Wexford Railway Company*, 30 L. R. Ir. 514.

nated in the Act. Another argument for the defendants was that, inasmuch as the remedy for the personal injury died with the person, the damages to the estate, being consequential on the personal injury, died also. I do not at all see that that follows as a necessary or logical consequence. The two sorts of damage are separable: the one is pecuniary loss to the estate immediately and naturally arising out of the accident; the other is personal to the party injured, and, as such, dies with the person. I do not see that there is any valid distinction between this case and that of *Potter v. Metropolitan District Railway Company*,¹ or why the damage to the estate, that would clearly be recoverable if the injured party lived, should be the less recoverable because of his death."

In *Leggott v. Great Northern Railway Company*,² Mellor, J., is reported as saying: "With the single exception, as far as I am aware, of the case in the Common Pleas, *Bradshaw v. Lancashire and Yorkshire Railway Company*, there appears to be no authority that an action will lie by the executor in respect of what is claimed in this action. But as that case has been decided on the very point,³ I entirely yield to the authority of the decision, so far as to say that in this Court it cannot be questioned, and we must therefore abide by it. I must say, however, that we yield to it for the purposes of this case; and that, at all events, if it is to be questioned, it must be questioned in a court of appeal." And Quain, J., said: "With regard to the action itself, I merely say I yield to the decision in the Common Pleas without assenting to it." There was, however, no appeal; and, after the decision in *Brunsdon v. Humphrey*,⁴ the law in *Bradshaw v. Lancashire and Yorkshire Railway Company* may be considered established.⁵

The decision
doubted in
Leggott v.
Great
Northern
Railway
Company,

but not ap-
pealed against,
and established
by *Brunsdon v.*
Humphrey.

¹ 30 L. T. (N. S.) 765.

² (1876) 1 Q. B. D. 599, at 605.

³ The contention in *Leggott v. Great Northern Railway Company* was that the plaintiff had recovered in respect of the injury caused by the death, and therefore was estopped from recovering for damages to the estate. *Pulling v. Great Eastern Railway Company*, 9 Q. B. D. 110, distinguishes *Leggott v. Great Northern Railway Company*. See also *London v. London Road Car Company*, 4 Times L. R. 448, and the Scotch cases, *Eisten v. North British Railway Company*, 8 Macph. 980; *Clarke v. Carfin Coal Company* (1891), App. Cas. 412; *Wood v. Gray* (1892), App. Cas. 576; *Whitehead v. Blaik*, 20 Rettie 1045.

⁴ 14 Q. B. D. 141.

⁵ In giving judgment in *Chamberlain v. Williamson*, 2 M. & S. 408, an action by an administrator for a breach of promise of marriage to the intestate, Lord Ellenborough, C.J., said: "The general rule of law is *Actio personalis moritur cum persona*, under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property—that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. But in that case the special damage ought to be stated on the record, otherwise the Court cannot intend it. . . . Where the damage done to the personal estate can be stated on the record, that involves a different question." The converse case, of action for breach of promise against the executors of the promisor, was considered by the Court of Appeal in *Finlay v. Chirney*,

The effect of a settlement out of Court in barring an action.

In *Read v. Great Eastern Railway Company*¹ the point was argued that the executor could bring a fresh action even if the deceased had recovered damages in an action; the decision was, as we have seen, that the intention of the Act was not to charge the wrongdoer twice. The question of the circumstances in which a claim might be defeated by a settlement was thus left undetermined; though it is clear, from the decision, that damages recovered in an action would debar further recovery.

Roberts v. Eastern Counties Railway Company.

In *Roberts v. Eastern Counties Railway Company*,² plaintiff received £2 compensation for his hat, not being aware at the time that he had himself been seriously injured. The company set up the payment as a discharge. But the Chief Justice (Cockburn) refused to treat seriously the argument that the plaintiff was thereby precluded from recovering for his bodily injuries. This case is, however, almost identical with the subsequent case of *Brunsdon v. Humphrey*.³

Rideal v. Great Western Railway Company.

In *Rideal v. Great Western Railway Company*⁴ the same plea was raised, where the plaintiff had received £20, for which he gave a receipt, as it was alleged, in full satisfaction of the grievance complained of; Erle, C.J., notwithstanding, left the case to the jury with the direction: "In terms the receipt which he signed no doubt supports that plea. Did his mind go with those terms? Was he aware of their import and effect at the time he signed? If, as he declares, he did not read the receipt and supposed it was a mere receipt, it is clear that he did not so agree. But on the other hand, if he did read it, being a man of business, he must be taken to have understood it, and it expressly included future and consequential inquiries. No doubt a man might well be ready to take a certain sum in satisfaction of such injuries as he was sensible of, which would not be any equivalent for serious and permanent injuries. Still, if, in fact, a man has done so, he is bound by his bargain. No improper practice has been proved, nor does it appear that the company's servants took any unfair advantage of the plaintiff. The question,

Erle, C.J.'s, direction to the jury.

20 Q. B. Div. 494. Bowen, L.J.'s, judgment goes exhaustively into the history of the maxim. The Court held that special damage to the property may be recovered in such an action, and indicated what class of expenditure would be regarded. See 3 & 4 Will. IV. c. 42, s. 2. A Canadian case, *White v. Parker*, 16 Can. S. C. R. 699, may also be referred to. One Parker brought an action against "the conductor of a train" for injuries received in attempting to board the train, and alleged to be caused by the negligence of the conductor in not bringing the train to a standstill. On the trial plaintiff was nonsuited, but the nonsuit was set aside. Between nonsuit and judgment ordering a new trial, Parker, the plaintiff, died, and a suggestion of his death was entered on the record. It was, however, held that, under Lord Campbell's Act, an entirely new cause of action arose on Parker's death, so that the original action was entirely gone and could not be revived.

¹ L. R. 3 Q. B. 555, *Farmer v. Grand Trunk Railway Company*, 21 Ont. R. 299.

² 1 F. & F. 460.

³ 14 Q. B. D. 141.

⁴ 1 F. & F. 706.

therefore, simply is, did his mind go with the terms¹ of the paper which he signed, and was he aware of its effect?" This statement of the law was quoted with approval by Mellish, L.J., in *Lee v. Lancashire and Yorkshire Railway Company*² as raising "the precise question the judge ought to leave to the jury. Did his mind go with this receipt, and did he understand and know at the time that he was accepting it in full satisfaction and discharge?" There the plaintiff filed a bill to restrain the defendant company from setting up the acceptance of £400, and a receipt for the same in discharge of the damages sustained by the plaintiff, who was injured in a railway accident, and relied on the authority of *Stewart v. Great Western Railway Company*,³ where, "while a poor man was lying suffering from an accident, persons went to him on behalf of the railway company and induced him to accept a small and almost nominal sum in full of all demands, making false representations to him as to the medical opinions which had been given about his case." The Court distinguished this case on the ground of fraud; in the case of the existence of which the Court will exercise its jurisdiction to restrain the setting up of a document obtained through the same in any circumstances. Where no fraud exists, the question of the intention in the case of the receipt of money as satisfaction for an injury must be left to the jury.⁴

Mellish, L.J.,
in *Lee v.*
Lancashire
and Yorkshire
Railway
Company.

Stewart v.
Great Western
Railway
Company
distinguished.

In *Wright v. London General Omnibus Company*⁵ the plaintiff had been awarded £10 by a magistrate, under 6 & 7 Vict. c. 86, s. 28, as compensation for injuries sustained by him through furious and negligent driving of two omnibus drivers, which he had accepted; and this was held by the Queen's Bench Division (Cockburn, C.J., and Mellor, J.) to disentitle him to sue the omnibus company, though the payment was utterly inadequate and made by the drivers. It was pointed out that Lee's case was not in point, as the present was a case of *res judicata* and not a question of accord and satisfaction.

Wright v.
London
General Omni-
bus Company,
res judicata.

Lee's case
distinguished.

A question about which there has been considerable diversity of legal opinion is whether the Admiralty Court—now the

Can Admiralty
Division enter-
tain an action
in rem under
Lord Camp-
bell's Act?

¹ In *Prosser v. The Lancashire and Yorkshire Accident Insurance Company*, 6 Times L. R. 285, the Court of Appeal, having had *Rideal v. Great Western Railway Company* cited to them, held that an agreement to accept a certain sum of money which was set up in bar of an accident claim, "meant the claim which had already been made," and had no reference to any claim for future or prospective disablement, as to which plaintiff could recover.

² L. R. 6 Ch. 527, at 538; Mellish, L.J.'s, judgment should be specially referred to 536-538. See per Thesiger, L.J., *De Buseche v. Alt*, 8 Ch. D. 286, at 314, and the House of Lords case of *North British Railway Company v. Wood*, 18 Rettie (H. L.) 27, where plaintiff, having taken £27 in settlement, was held barred from pursuing an action for £5000 damages.

³ 2 De G. J. & S. 319.

⁴ To the same effect is *M'Donagh v. MacClellan*, 13 Rettie 1000.

⁵ (1877) 46 L. J. Q. B. 429. Cp. *Midland Railway Company v. Martin & Co.* (1893), 2 Q. B. 172.

Admiralty Division of the High Court—can entertain an action *in rem* for damages for loss of life under Lord Campbell's Act.

The Sylph.

In the case of *The Sylph*¹ it was held by Sir Robert Phillimore that the Court of Admiralty has jurisdiction over all torts and injuries done within the ebb and flow of the tide. "The whole law" (*i.e.*, of the ancient jurisdiction of the Court of Admiralty), he observes, "is collected in the judgment delivered by Mr. Justice Story in the case of *De Lovio v. Boit*."² This judgment, in truth, exhausts all the learning upon the subject." Lord Esher, M.R., however, points out³ that this, learned and exhaustive as it is, has not been acted up to even in America.

Admiralty Court Act, 1861.

In England, moreover, statutory enactments have interfered with the jurisdiction anciently exercised in Admiralty; ⁴ by the Admiralty Court Act, 1861, s. 7,⁵ it is, however, enacted that the "High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." In the case of *The Diana*⁶ Dr. Lushington said that "the object of the Act, as stated in the title and preamble, is 'to extend the jurisdiction' of the Court."⁷ The 7th section, which deals with the subject of damage, does not particularize any circumstances to which the jurisdiction of the Court is to extend, but gives the Court jurisdiction in the widest and most general terms."⁸

The Guldfaxe.

It was next contended, in the case of *The Guldfaxe*,⁹ that it was intended to comprise a case of loss of life by collision in the phrase "damage done by any ship." "Not without doubt and hesitation," Sir Robert Phillimore here held that it was: "It is true that Lord Campbell's Act contemplates only an action against the person; but then the 35th section of the Admiralty Court Act enacts as follows: 'The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings

¹ (1867) L. R. 2 A. & E. 24.

² 2 Gallison (U. S. Circ. Ct.) 398. The subject is also exhaustively treated, 1 Kent, Comm. 366-378; in the 12th ed. there is also a full note by Mr. Holmes.

³ *The Queen v. Judge of City of London Court* (1892), 1 Q. B. 273, at 293; *The Zeta* (1893), App. Cas. 468.

⁴ For the antiquity and jurisdiction of the Court of Admiralty and of the Office of Lord High Admiral, see charge of the judge of the Vice-Admiralty, Bonnet's case, 15 How. St. Tr. 1231; Sheppard, Abridgment, 128; Sheppard, Epitome, 361. See Erskine's argument, that the Court of Admiralty can take no cognisance of a felony committed on land. Codling's case, 28 How. St. Tr. 177, at 274; also *The Neptune*, 3 Knapp, P. C. 94.

⁵ 24 Vict. c. 10. Sec. 5 is considered in *The Two Ellens*, L. R. 3 A. & E. 345, L. R. 4 P. C. 161; sec. 10 in *The Sara*, 14 App. Cas. 209.

⁶ Lush. 539, at 540.

⁷ See per Lord Esher, M.R., *The Zeta* (1892), P. 285 at 297, dissented from in the H. of L. (1893), App. Cas. 468, 487, 490.

⁸ *The Malvina*, Lush. 493, decided under this section, held that the owners of a ship can be made liable for damages by a collision with a barge within the body of a county. See the collection of cases in the appellants' argument in the H. of L. *The Zeta* (1893), App. Cas. 468-471.

⁹ (1868) L. R. 2 A. & E. 325, at 328.

in rem or by proceedings *in personam*.' And it was admitted by the counsel for the defendant, that the argument to be derived from the language of Lord Campbell's Act, was as strong against the jurisdiction of this Court *in rem* as *in personam*."

The Judicial Committee of the Privy Council had the same point before them in the case of *The Beta*,¹ and, without calling The Beta. on the respondents, decided that the words of section 7 "clearly include every possible kind of damage. Personal injuries are undoubtedly within the words 'damage done by any ship.'"

Sir Robert Phillimore adhered to his previous decision in the next case, that of *The Explorer*,² where the collision took place on the high seas, and the persons killed were aliens. But in *Smith v. Brown*,³ Cockburn, C.J., and Hannen, J., prohibited the Court of Admiralty from entertaining a suit instituted under Lord Campbell's Act for personal injuries, resulting in death, occasioned by the collision of two vessels. They held that "neither in common parlance nor in legal phraseology is the word 'damage' used as applicable to injuries done to the person, but solely as applicable to mischief done to property." And, further, that to hold that there was a transfer of the jurisdiction of the courts of common law to the Court of Admiralty would not only deprive the parties of the common law procedure and mode of trial, but would materially alter their rights and relative position; as the Court of Admiralty, in dealing with claims for damage arising from collision, acts upon principles unknown to the common law, and which, though very proper in the case of damage done by one vessel to another, are altogether inapplicable to the case of personal injury or the right to compensation given by the 9 & 10 Vict. c. 93. Blackburn, J., was also of the Court; and though his "doubts" were "not altogether removed," they were, he said, "not strong enough to make me dissent from this judgment, or even to require further time for consideration."⁴

The question again came before the Court of Admiralty in *The Franconia*,⁵ when Sir Robert Phillimore, while adhering to

¹ L. R. 2 P. C. 447.

² (1870) L. R. 3 A. & E. 289.

³ (1871) L. R. 6 Q. B. 729. In the *Charkieh*, L. R. 8 Q. B. 197, the Queen's Bench refused to interfere where the question was as to the jurisdiction of the Admiralty to entertain a suit against a ship alleged to belong to a foreign Sovereign but engaged in commerce, on the ground that the Court of Admiralty could itself decide the point.

⁴ L. R. 6 Q. B. 729, at 737. Per Kelly, C.B.: "The decision of *Smith v. Brown*, with which I entirely agree"; *James v. London and South-Western Railway Company*, L. R. 7 Ex. 195. See, too, per Brett, J., *Simpson v. Blues*, L. R. 7 C. P. 290, at 299. As to this case, see *Cargo ex Argos*, L. R. 5 P. C. 134, followed in *The Alina*, 5 Ex. D. 227; *The Rona*, 7 P. D. 247, 250; also Lord Esher, M.R.'s, comment in *Queen v. Judge of City of London Court* (1892), 1 Q. B. 273, at 290, cited *post*, 247, n. 1, 248.

⁵ 2 P. D. 163, 169. To the same effect is *Ex parte Gordon*, 104 U. S. (14 Otto) 515. See *The Queen v. Keyn*, 2 Ex. D. 63; *Harris v. Owners of The Franconia*, 2 C. P. D. 173, 41 & 42 Vict. c. 73.

his previous decisions, took occasion to point out that, in the Merchant Shipping Act, 1854, the word damage is applied to "loss of life and personal injury." On appeal, the Court were equally divided, Bramwell and Brett, L.JJ., being of opinion that the appeal should be allowed, and, as a reason for their decision, they called special attention to "the difficulty arising from the difference between the Admiralty and common law rule as to contributory negligence." Baggallay, L.J., delivered a judgment affirming the view taken by Sir Robert Phillimore, principally on the ground of the generality of the words of the Admiralty Court Act, 1861, and the indeterminate use of the word damage; and this was concurred in by James, L.J. "I am unable," says Baggallay, L.J.,¹ "to concur in the construction of the Admiralty Court Act, 1861, which has been so adopted by the Court of Queen's Bench,² and apparently concurred in by the other Courts to which I have just referred;³ it appears to me that the view taken by the Court of Admiralty,⁴ and by the Judicial Committee of the Privy Council,⁵ is the more correct." The result was, that the judgment of the Court of Admiralty was sustained.

The Vera Cruz
(No. 2).

The same question was once again mooted in *The Vera Cruz* (No. 2),⁶ where Butt, J., held, on the authority of *The Franconia*, that the Court had jurisdiction to entertain an action *in rem* against a foreign ship for damages for loss of life and personal injury. The Court of Appeal, however, reversed his decision, and held that the Admiralty Division had no jurisdiction in an action *in rem* against a ship under Lord Campbell's Act. Bowen, L.J., reasoned as follows: "The only claim that can arise must either be a claim for the killing of the deceased, or the injuriously affecting his family. The killing of the deceased *per se* gives no right of action at all, either at law or under Lord Campbell's Act. But if the claim be, as it only can be, for the injuriously affecting the interests of the dead man's family, the injurious affecting of their interests is not done by the ship in the above sense. It arises partly from the death, which the ship causes; and partly from a combination of circumstances, pecuniary or other, with which the ship has nothing to do. The injury done to the family cannot, therefore, be said to be done by the ship."

¹ 2 P. Div. 163, at 173.

² *Smith v. Brown*, L. R. 6 Q. B. 729.

³ See note 4, *ante*, 245.

⁴ In *The Sylph*, L. R. 2 A. & E. 24.

⁵ In *The Beta*, L. R. 2 P. C. 447.

⁶ 9 P. D. 96, at 101. No suit in Admiralty can, at common law, be maintained in the Courts of the United States for the recovery of damages for the death of a human being caused by negligence on the high seas or on waters navigable from the sea. *The Harrisburg*, 119 U. S. (12 Davis) 199. For the law in Canada see *Monaghan v. Horn*, 7 Can. S. C. R. 409.

In the House of Lords,¹ the decision of the Court of Appeal was affirmed, and the Admiralty Division held to be without jurisdiction to entertain the claim. Lord Selborne was of opinion that, if the case necessarily came within the words "any claim for damage done by any ship," according to the reasonable construction of those words in connection with the clause which authorizes proceedings *in rem*, then the words, being general, would include it; but express or special inclusion was not indicated. And while the Admiralty Court Act, 1861, related expressly to claims for damage done by any ship, and section 7 related to that and nothing else, Lord Campbell's Act was concerned with "general injuries resulting in loss of life by wrongful acts." That being so, "it is not very likely that, when the legislation goes on such different lines, it should be intended indirectly to affect by the one legislation, and in a peculiar manner, a particular case which may or may not arise under the other legislation." Yet, further, the action under Lord Campbell's Act is, "as plainly as possible, a personal action given for a personal injury inflicted by a person who would have been liable to an action for damages manifestly in the common law courts if the death had not ensued;" and the Admiralty rules, which would be applied if the action were validly brought in the Admiralty Division, are inconsistent with certain provisions of Lord Campbell's Act—as, for instance, those regulating the delivery of particulars.

In the House
of Lords.

Lord
Selborne's
opinion.

Lords Blackburn and Watson assented to the view of the Lord Chancellor on the question immediately before them—the effect of Lord Campbell's Act; but Lord Blackburn, alluding to the case of *Smith v. Brown*, guarded himself from deciding more than the actual point under Lord Campbell's Act. "If," he said, "the question now raised had been whether personal damage to a man *who lived* was within the 7th section of the enactment, I should have had, as I then had [*i.e.*, in *Smith v. Brown*], some doubt about the matter, and it would have carried me so far that, if that had been the question now raised, I certainly should have wished to hear the case argued out to the end before giving an opinion upon it one way or the other."² Lord Watson also expressed no opinion on the wider question.³

¹ 10 App. Cas. 59, 65, 67, 68.

² At 72.

³ In *The Bernina*, 11 P. D. 31, Butt, J., held that an action under Lord Campbell's Act is not within sec. 25, sub-s. 9 of the Judicature Act, 1873; and this was affirmed by the Court of Appeal, 12 P. D. 58; see, per Lord Herschell in the House of Lords, 13 App. Cas. 1, at 10. *Everard v. Kendall*, L. R. 5 C. P. 428, decided that if the Admiralty Court had no jurisdiction, the County Court Acts have not given a jurisdiction to the County Courts. Yet Sir Robert Phillimore points out in *The Dowse*, L. R. 3 A. & E. 135, that in some cases where the Court of Admiralty has no original jurisdiction, it, notwithstanding, has appellate jurisdiction—*e.g.*, as to claims arising out of agreements for the use or hire of a ship and the carriage of goods in a ship. In

The law may, then, be regarded as definitely settled that the Admiralty Division has no jurisdiction to entertain suits instituted under Lord Campbell's Act by the legal personal representatives of the deceased person against the wrongdoing vessel.

American rule. The result of the American decision is the same. In the Supreme Court of the United States, in the case of *The Corsair*,¹ it is laid down that, in an Admiralty suit, there is no power to entertain a libel *in rem* for damage incurred by loss of life, where by the local law, a right of action survives to the administrator or relatives of the deceased, but no lien is expressly created by the Act.

The Merchant Shipping Acts. By the Merchant Shipping Act, 1854,² s. 506, the owner of every sea-going ship or share therein is liable in respect of loss of life or personal injury, to the same extent as if no other loss, injury, or damage had arisen. Where, however, loss of life or personal injury is occasioned by a collision, the legal personal representatives of the deceased person, or the person injured, must wait until the completion of the inquiry (if any) instituted by the Board of Trade, or until the Board of Trade has refused to institute an inquiry. And to ascertain this, the person desiring to bring the action must serve a notice to that effect on the Board of Trade; if the Board does not institute an inquiry within a month, then he has his action; if it does institute the inquiry, then the procedure is regulated by ss. 507-12 of the Merchant Shipping Act, 1854. By the Merchant Shipping Act Amendment Act, 1862,³ s. 54, the shipowner's liability for loss of life or personal injury to any person being carried in any ship, British or foreign, is limited to an aggregate amount of £15 for each ton of the ship's tonnage. This matter will subsequently be more fully considered.

By the Merchant Shipping Act, 1854, s. 514, where any liability has been, or is alleged to have been, incurred by any owner of a ship in respect of loss of life, personal injury, or loss of or damage to ships, boats, or goods, and several claims are made or apprehended in respect of such liability, he may commence a suit in the Court of Chancery for the purpose

The Alina, 5 Ex. Div. 227, the Court of Appeal decided that sec. 2 of 32 & 33 Vict. c. 51, gave the County Courts jurisdiction with regard to actions for breach of charter-party, although the Admiralty Court had none. In *The Queen v. Judge of City of London Court* (1892), 1 Q. B. 273, at 290, Lord Esher, M.R., says: "I desire to speak with great respect of *The Alina*; but I think that rules of interpretation are laid down in that case which are absolutely novel. I will obey that case, because it is the decision of the Court of Appeal, until it has been reviewed by the House of Lords, and then I will obey whatever the House of Lords determines; but I will not be bound by *The Alina* one particle beyond what actually decides and determines. I do not consider that it has overruled all former cases and all rules for the interpretation of statutes." See *The Zeta* (1893), App. Cas. 468.

¹ 145 U. S. (38 Davis) 335, at 343. The English cases are collected and considered in the judgment.

² 17 & 18 Vict. c. 104.

³ 25 & 26 Vict. c. 63.

of determining the amount of such liability and for the distribution of the amount rateably amongst the several claimants,¹ and the Court has power "of stop all actions and suits pending in any other court in relation to the same subject-matter."² By the Admiralty Court Act, 1861,³ the powers of the Court of Chancery under the Merchant Shipping Act, 1854, are conferred on the High Court of Admiralty.

The Admiralty Division can therefore, in a certain event, assess damages under Lord Campbell's Act. This further appears from the judgment, in the Court of Appeal, of Brett, M.R., in *The Vera Cruz* (No. 2),⁴ who alludes to this Act and its effect in these terms: "But I will not say that in no case, for no purpose, may the Court of Admiralty not inquire into damages to a deceased person. For a great many years the Court of Chancery had jurisdiction to limit the amount of the shipowner's liability, and, if there were several claimants against the ship, to divide the amount for which the shipowner was liable amongst them. In such a suit the liability was admitted. That jurisdiction has been given to the Admiralty Court. At the present time, in such an action, if one of the claimants against the fund is a person who sues under Lord Campbell's Act, it being necessary to distribute the fund according to statute, it may well be that the Chancery or Admiralty Division must do something not otherwise within its direct jurisdiction—it must take cognizance of such a claim in order to fulfil its regular jurisdiction." Conclusion from their provisions.

Lord Selborne, also, in *Seward v. The Vera Cruz*, in the House of Lords,⁵ affirms the *jurisdiction* of the Admiralty Division to deal with an action under Lord Campbell's Act "as in any other case (but not more in this than in any other case), if no objection were taken, and no transfer asked for or made," but that would, of course, not constitute an Admiralty action under the special Admiralty jurisdiction; this must be determined irrespective of the Judicature Act; since the sole effect of the Judicature Act is to enable the judge of the Admiralty Division, saving objections, to entertain any cause of action over which the High Court of Justice, of which the Admiralty Division forms a portion, has jurisdiction; but not to affect with special Admiralty rights or remedies anything which before the Act was not the subject of Admiralty jurisdiction.⁶ Lord Selborne's view of the jurisdiction of the Admiralty Division under Lord Campbell's Act.

¹ *Hill v. Andrus*, 24 L. J. Ch. 229.

² *Leycester v. Logan*, 26 L. J. Ch. 306.

³ 24 Vict. c. 10, s. 13.

⁴ 9 P. C. 96, at 100.

⁵ 10 App. Cas. 59, at 64.

⁶ In *The Orwell*, 13 P. D. 80, an action under Lord Campbell's Act, commenced in the Admiralty Division, it was held that upon default in pleading for the defendant, the plaintiff was entitled to enter interlocutory judgment and to have the damages assessed and apportioned by a jury.

Child *en ventre
sa mère.*

In the case of *The George and Richard*,¹ a limitation of liability suit brought in the Court of Admiralty, a child *en ventre sa mère* was held entitled to be reckoned amongst the representatives amongst whom apportionment of a sum recovered would have to be made.² This decision, inevitable upon principle, was supported by a sentence in the judgment of Coleridge, J., in *Blake v. Midland Railway Company*:³ "By what rules ought the jury to be guided in this apportionment? Are they to inquire into the degree of mental anguish which each member of the family has suffered from the bereavement? Then not only the child without filial piety, but a lunatic child, and a child of very tender years, and a *posthumous child on the death of the father*, may have something for pecuniary loss, but cannot come in *pari passu* with the other children, and must be cut off from the solatium."

Miscellaneous
points.

It has also been decided that it is not necessary, under Lord Campbell's Act, to negative the existence of any relatives of the deceased other than those named in the declaration;⁴ that a bastard cannot maintain an action;⁵ that where the death occurred on board a steamer during a voyage, from a boiler explosion due to corrosion which had been going on for a period, in some portion of which the steamer had been in Ireland, no part of the cause of action arose within the jurisdiction of the Irish Courts,⁶ and substituted service could not be allowed; that where the jury has manifestly shrunk from deciding the issue, there must be a new trial;⁷ that default in delivering particulars with the declaration under section 4 is ground for setting aside the service of the writ, but not for setting aside the writ itself; and the objection that the plaint does not state facts shewing an obligation by the defendant to the deceased is matter for demurrer, and is not ground for setting aside the plaint as embarrassing;⁸ that money having been paid to compromise an action, but no division or apportionment of the money having taken place and there being no legal right to obtain apportionment, an action will

¹ L. R. 3 A. & E. 466. See *Walker v. Great Northern Railway Company of Ireland*, 28 L. R. Ir. 69, discussed *ante*, 84.

² See *Wms. Exors.* (9th ed.) 1367; *Notes to Viner v. Francis*, Tud. L. C. Real Property (3rd ed.), 798.

³ 18 Q. B. 93, at 110.

⁴ *Barnes v. Ward*, 9 C. B. 392, at 398. The 3rd section of the Act provides "that not more than one action shall lie for and in respect of the same subject-matter of complaint."

⁵ *Dickinson v. North-Eastern Railway Company*, 2 H. & C. 735. Neither may the mother of a bastard child, *Clarke v. The Carfin Coal Company* (1891), App. Cas. 412. *Wood v. Gray & Sons* (1892), App. Cas. 576.

⁶ *Walsh v. Great Western Railway Company*, Ir. R. 6 C. L. 532.

⁷ *Springett v. Balls*, 7 B. & S. 477.

⁸ *McCabe v. Guinness*, Ir. R. 9 C. L. 510; on the latter point *Fitzgerald, B.*, dissented.

lie, though the proper remedy is to go to a court of equity to compel the person making default to administer the trust ;¹ that money paid into court may be paid out on a consent, embodying the agreed terms of payment, being made a rule of Court ;² that, failing an agreement, money paid into Court may be paid out in proportions fixed by analogy to the Statute of Distributions ;³ and that an action⁴ can be sustained by a relative of the deceased though brought within six calendar months from the death, although at the time there be an executor or administrator of the deceased.⁵

¹ *Condliiff v. Condliiff*, 29 L. T. (N. S.) 831.

² *Shallow v. Verdon*, Ir. R. 9 C. L. 150.

³ *Sanderson v. Sanderson*, 36 L. T. (N. S.) 847. See per Bramwell, L.J., giving judgment in *The Franconia*, 2 P. D. 163, at 171: "We are of opinion that under that section it might be a jury who find and direct the division into shares." As to granting a discharge under 49 & 50 Vict. c. 26, s. 2, for payments made in compensation to infants. *Jack v. North British Railway Company*, 14 Rettie 263. In England the matter is regulated R. S. C. 1883, Order xxii. rr. 15, 16. As to right to bring successive actions where plaintiff's father and stepfather were simultaneously killed, *Johnston v. Great Northern Railway of Ireland*, 26 L. R. Ir. 691.

⁴ Under 27 & 28 Vict. c. 95.

⁵ A wife living in adultery may not recover under Lord Campbell's Act : *Stimpson v. Wood*, 4 Times L. R. 589, 36 W. R. 734. *Quære*, whether evidence of the husband's willingness to take her back would entitle her to maintain the action. In *Steele v. The Great Northern Railway Company*, 26 L. R. Ir. 96, an application made by the father and mother of the deceased that they might be at liberty to appear by counsel and solicitor at the trial of an action brought by the deceased's widow and administratrix, and tender evidence as to the amount of their shares of the money to be awarded as damages in the action, or in default might be made parties thereto, was refused, and *Johnston v. The Great Northern Railway Company*, 20 L. R. Ir. 4, was considered, where a somewhat similar application was allowed.

BOOK II.

**OF AUTHORITIES SPECIALLY
CONSTITUTED FOR EXERCISING
CONTROL.**

BOOK II.

OF AUTHORITIES SPECIALLY CONSTITUTED FOR EXERCISING CONTROL.

PRELIMINARY.

IN considering the constitutive elements of negligence we have ascertained that to found liability it is necessary that the wrongful act charged must be imputable to some person as distinguished from an unreasoning force; and this person must be a responsible agency. We then proceeded to indicate the principal classes of persons who do not fulfil the requirements of responsible agency. It thence appeared that with the exception of those under the various disabilities then treated of, all natural persons are capable of becoming what Dr. Wharton¹ terms a "juridical cause."

Besides natural persons, the law under the designation of persons, includes various artificial arrangements for the purposes of society and government, whose functions and liabilities are not determined by the rights and duties of the individual natural persons composing them, but, in part, by various arbitrary rules impressed on these artificial persons at the time of their constitution; and in part, by the general law of the land as modified by special rights and remedies having reference to these composite bodies and not to the individuals composing them.²

So far as these authorities, specially constituted for exercising control, are in the nature of exceptions to the general rule of liability, we now proceed to consider them. It must, however, not be lost sight of that where there is no special principle affecting them, the liability they are under in no way differs from that of natural persons; substituting, in the first instance, artificial liability for the individual, but not forgetting, whatever the pretext of an act, that where it is the wrongful act of a natural person in the last resort he is personally liable.

We shall consider these artificial persons—

I. As public officers.

II. As corporations and local administrative bodies.

¹ Negligence, § 87.

² See *Pharmaceutical Society v. London and Provincial Supply Association*, 5 App. Cas. 857, per Lord Blackburn, at 867.

CHAPTER I.

PUBLIC OFFICERS GENERALLY.

The Sovereign UNDER this head it is convenient to consider the position of the Sovereign, though constitutionally there is very slight analogy between his position and that of the large number of functionaries whom we shall here have to treat of.

The negligence of the Sovereign may be either personal negligence or negligence through his servants. As to the former, the constitutional maxim is *Rex non potest peccare*.¹ If the Sovereign personally command an injurious act, the act may be wrongful, yet the Sovereign is not accountable.² The maxim that the King can do no wrong applies to personal as well as to political wrongs, and not only to wrongs done personally by the Sovereign, but to injuries done by a subject by the authority of the Sovereign.³ This was laid down in *Viscount Canterbury v. Attorney-General*,⁴ where it was admitted that for the personal negligence of the Sovereign no proceeding could be maintained. This is the basis of Lord Lyndhurst, C.'s, judgment. "If," he says, "the master or employer is answerable upon the principle that *Qui facit per alium, facit per se*, this would not apply to the Sovereign, who cannot be required to answer for his own personal acts. If it be said that the master is answerable for the negligence of his servant because it may be considered to have arisen from his own misconduct or negligence in selecting or retaining a careless servant, that principle cannot apply to the Sovereign, to whom negligence or misconduct cannot be imputed, and for which, if they occur in fact, the law affords no remedy. Cases have arisen of damages done by the negligent management of ships of war. It has been held that where the act is done by one of the crew, without the

¹ Broom, *Legal Maxims* (6th ed.), 46. *Le grand case in le Court Garde*, 2 Rolle Rep. 294, at 304, where it is written, *Alii possint non peccare, ille non potest peccare*.

² Chitty, *Prerogative*, 5.

³ Chitty, *Prerogative*, 339, 340. *Feather v. The Queen*, 6 B. & S. 257, per Cockburn, C.J., at 295.

⁴ 1 Phillips, 306, at 321; 4 St. Tr. N. S. 767.

participation of the commander, the latter is not responsible.¹ But if the principle now contended for be correct, the negligence of the seamen in the service of the Crown would raise a liability in the Crown to make good the damage, and which might be enforced by a petition of right."

The case of *Viscount Canterbury v. Attorney-General* is important for another legal position that it established. The proceedings were by Petition of Right, brought by the Speaker of the House of Commons, for damage done to his furniture by the fire, burning down the Houses of Parliament, caused by the negligently burning of bundles of Exchequer tallies, which had been ordered to be removed. The control of the Houses of Parliament had been vested in the Commissioners of Woods and Forests, officers appointed by the Crown and removable at pleasure. The subordinate officers were appointed by the Commissioners. It was by these subordinate agents that the fire was alleged to have been caused. Assuming that they were servants of the Crown, though it was insisted they were servants only of the Commissioners, the inquiry was whether the Crown was responsible for their negligence. The Lord Chancellor discusses the matter thus: "Now, assuming that the fire had been caused by the personal negligence of the Commissioners, would the Crown, in such case, have been liable to make good the loss? They are indeed styled servants of the Crown; but they are, in truth, public officers appointed to perform certain duties assigned to them by the Legislature, and for any negligence in the discharge of such duty, and any injury that may be thereby sustained, they alone are, I conceive, liable. Is it supposed that the Crown is responsible for the conduct of all persons holding public offices and appointments, and bound to make good any loss or injury which may be occasioned by their negligence or delinquency? At least some authority should be cited in support of such a doctrine. But then it is said, these officers are appointed by the Crown and are removable at the pleasure of the Crown. That circumstance alone will not, I conceive, create any such liability. The Keeper of the Great Seal and other persons holding high situations in the State have authority to appoint to many offices and also to remove the persons so appointed at their pleasure. But they are not, on that account, subject to make compensation for injury occasioned by the neglect or misconduct of the persons so appointed. The mere selection of the officers does not create a liability. But if the Crown would not be responsible for the act done, had it been done by the superiors, it follows that it cannot

*Viscount
Canterbury v.
Attorney-
General.*

*Lord Lynd-
hurst, C.'s,
judgment.*

¹ *Nicholson v. Mouncey*, 15 East 384. Cp. *Wright v. Lethbridge*, 63 L. T. 572.

be held liable for the negligence of their subordinate agents whom they appoint and remove, and with the selection or control of whom the Crown has no concern."¹

Consideration
of the liability
of servants of
the Crown.

Since, then, it is plain that the Sovereign cannot personally be made liable for the negligences and torts of his servants, it remains to consider in what circumstances, and to what extent, those servants are themselves protected for acts done, or purporting to be done, in the course of their service.

I. As to
contracts.

The law has been clearly laid down, with regard to contracts, that no cause of action exists against either servant or agent of the Crown as distinguished from the servant or agent of a private person. That is, in cases which, were they of a private nature, would involve the agent in a personal liability by construction of the contract in accordance with general principles, in the case of the agent of the Crown will not avail to charge him personally at all. An agent or servant on behalf of the Crown is not, however, incapacitated from binding himself by an express agreement; he is not liable in the absence of an express agreement; but if he enters into one, he is bound by its terms, what-

¹ 4 St. Tr. N. S. 767, at 780. As to the remedies for any infringement of the subject's right, in Broom, Constitutional Law (2nd ed.), 238, occurs the following passage: "The Constitution of England, says Lord Holt, in *Ashby v. White* (14 How. St. Tr. 784), 'has wisely distributed to several courts the determination of proper causes, but has left no subject in any case where he is injured, without his adequate remedy, if he will go to the right place for it.' If the subject has cause of complaint against the Crown, he must proceed for redress by that pathway which the constitution has laid out for him; for an illegal invasion of his liberty he should proceed by *habeas corpus*; to obtain the revocation of a grant which injuriously affects him, he should proceed by *scire facias*; for an illegal invasion of the rights of property, he should proceed by Petition of Right." By statute 46 & 47 Vict. c. 57, s. 26, *scire facias* is abolished, in so far as it relates to patents for inventions. As to the history of Petition of Right and *Monstrans de droit*, and where they lie, see Com. Dig. Prerog. D. 78; Vin. Abr. Prerog. (Q. 7)-(Q. 13); Viscount Canterbury v. The Queen, 1 Phill. 306, 4 St. Tr. N. S. 767; *In re the goods of George III.* 1 Add. 255, 1 St. Tr. N. S. 1274, with authorities collected in a note, 1285; and the judgment of Blackburn, J., *Thomas v. The Queen*, L. R. 10 Q. B. 31. The present procedure is regulated by 23 & 24 Vict. c. 34; see for the practice, Clode, Petition of Right. For the proposition that the Sovereign could not be sued for a wrong, see *Tobin v. The Queen*, 16 C. B. N. S. 310, approved, *Feather v. The Queen*, 6 B. & S. 257, at 294; *Langford v. United States*, 101, U. S. (11 Otto) 341. In *Dixon v. London Small Arms Company*, 1 App. Cas. 632, *Feather v. The Queen* is treated as a case rightly decided, but as one not to be extended. In *Windsor and Annapolis Railway Company v. The Queen and the Western Counties Railway Company*, 11 App. Cas. 607, Lord Watson cites and adopts the statement of law of Cockburn, C.J., in *Feather v. The Queen*, "that the only cases in which the Petition of Right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or when a claim arises out of a contract, as for goods supplied to the Crown or to the public service"; *Farnell v. Bowman*, 12 App. Cas. 643; *Attorney-General of the Straits Settlements v. Wemyss*, 13 App. Cas. 192, where, under a Colonial Act, the Crown was held liable to be sued in tort. In the Supreme Court of Canada it has also been held that where railways are taken by the State a Petition of Right does not lie against the Crown for injuries resulting from either the nonfeasance or the misfeasance of the subordinate officers or agents employed in the public service on the railway; *The Queen v. McLeod*, 8 Can. S. C. R. 1; *The Queen v. McFarlane*, 7 Can. S. C. R. 216. The nature of *Monstrans de droit* is considered in the Case of the Bankers, 14 How. St. Tr. 1, at 77.

ever their stringency. The distinction then, between public and private agents, rests ultimately on a question of evidence and the existence of a different presumption from that existing in an ordinary case of private agency. The course of the decisions has been uniformly to this effect. The earliest is *Macbeath v. Haldimand*—an action against the Governor of Quebec, for military stores supplied to the garrison. Lord Mansfield's judgment went on the ground that "it was notorious that the defendant did not personally contract."¹

*Macbeath v.
Haldimand.*

Gidley v. Lord Palmerston,² again, is a well-known case. Money had been paid to the defendant as Secretary at War, which he was authorized to pay over to plaintiff's testator. Not having done so, he was sued in *assumpsit*; but the plaintiff was held disentitled to recover, on the grounds, as stated by Dallas, C.J., that the duty was "as between him and the Crown only, and not resulting from any relation to, or employment by, the plaintiff, or under any undertaking in any way to be personally responsible to him. The money received is granted by the Crown, subject only to the disposition or control of the defendant as the agent or officer of the Crown, and responsible to the Crown for the due execution of the trust or duty so committed. There is, therefore, no duty from which the law can imply a promise to pay to the testator during his life, or to his executor after his death, nor can money be said to have been had and received to the use of the testator, which money belonged to the Crown, being received as the money of the Crown, and the party receiving it being responsible only to the Crown in its public character."

*Gidley v. Lord
Palmerston.*

The cases were reviewed in the Privy Council, in *Palmer v. Hutchinson*.³ A claim was made against the Deputy Commissary-General for Natal to recover the price or hire of certain waggons and oxen for the carriage of goods. Their lordships were clearly of opinion that the Deputy Commissary-General could not be sued, either personally or in his official capacity, upon a contract entered into by him on behalf of the commissariat department; since he was not a corporation, and had no property or assets in his official capacity which could be seized or attached in execution of a decree against him in that capacity; while it was clear that "no portion of the Government revenue,

*Palmer v.
Hutchinson.*

¹ 1 T. R. 172, at 180. Cp. *Unwin v. Wolseley*, 1 T. R. 674, where the contract was "on behalf of Government." For a compendium of the American law on this subject with an examination of the English cases, see *United States v. Lee*, 106 U.S. (6 Otto) 196. The English authorities are reviewed 227-234.

² 3 Brod. & B. 275, 7 Moore (C. P.) 91, 1 St. Tr. N. S. 1263.

³ (1881) 6 App. Cas. 619. The American law is summed up and stated, *Hagood v. Southern*, 117 U. S. (10 Davis) 52. See also *Cooke v. United States*, 91 U. S. (1 Otto) 389, 398.

whether allocated to a special purpose or not, could be seized in execution under it."

Kinloch v.
Secretary of
State for India.

In *Kinloch v. Secretary of State for India*,¹ an attempt was made to obtain a legal remedy against the Secretary of State by alleging a trust to be constituted under the terms of a royal warrant, for which the Court could compel the Secretary of State to account and to distribute a fund, in which the plaintiff claimed to be entitled to share. The unanimous decision of the House of Lords was that the terms of the royal warrant did not constitute a trust, but merely an agency for the performance of duties which the Sovereign personally could not perform, and for the performance of which the Secretary of State was answerable to the Sovereign alone.²

I. As to torts.

Rogers v.
Rajendro Dutt.

With regard to torts, the subject is more complicated. Servants of the Crown are personally liable for any act not justifiable by a lawful authority from the Crown. If the act is in itself wrongful, the officer doing it will in any event be liable. This appears from *Rogers v. Rajendro Dutt*;³ where the owners of a steam tug sued the defendant for damage caused by an order issued in the defendant's official capacity forbidding the officers of the Bengal pilot service to allow the plaintiff's tug to take any ship in tow of which they should have the charge. In the particular case it was held that no action lay; but in giving judgment the Court said: "Neither does it seem to them to conclude the question in the action that the act complained of is to be considered as the act of Government, and that in the part which the defendant took in it he acted only as the officer of the Government, intending to discharge his duty as a public servant with perfect good faith, and with an entire absence of malice, particular or general, against the plaintiffs. For if the act which he did was in itself wrongful, as against the plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it was done by order of the superior power. The civil irresponsibility of the supreme power for tortious acts could not be theoretically maintained with any show of justice if its agents were not personally responsible for them. In such cases the Government is morally bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration." Special circumstances, in

¹ (1882) 7 App. Cas. 619. *The Queen v. Secretary of State for War* (1891), 2 Q.B. 326. See also *Alexander v. Duke of Wellington*, 2 St. Tr. N. S. 764.

² *Rice v. Chute*, 1 East 579; see note of a case, at 583, illustrating the maxim, *Cessante ratione cessat ipsa lex*.
³ 13 Moo. P. C. C. 209.

and therefore that his justification under the discipline of the navy had failed him.

Madrazo v. Willes.

The accountability of an officer, believing himself to act in pursuance of his authority, yet doing an act which is ultimately found outside it, is shewn by the case of *Madrazo v. Willes*.¹ A captain in the royal navy whose duty it was to arrest British ships engaged in the slave trade unlawfully took possession of the ship of the plaintiff, a Spanish merchant, engaged in the African slave trade, which was lawful by the law of Spain. A verdict and judgment were given for the plaintiff for £21,180; and though an unsuccessful attempt was made to reduce the damages, on the ground that the slave trade was by statute declared unlawful, no attempt was made to contest the captain's liability for his act.

Tobin v. The Queen.

Tobin v. The Queen is the converse case.² A vessel not registered as a British vessel was seized and destroyed as being engaged in the slave trade; whereas the vessel was alleged in the petition, and for the purposes of the case the averment was admitted, not to have been in any way engaged in the slave trade; nor liable to be condemned as so engaged. The Attorney-General demurred. After giving judgment in favour of the demurrer on various statutory points, the Court said: "If it be assumed that Captain Douglas had authority from the Crown to seize all ships engaged in the slave trade, so that the seizure, if lawful, would have been made by him in the capacity of agent for the Crown, still, if he seized a ship not engaged in the slave trade, he would not act within the scope of that authority, and would not make his principal liable for that wrong. Thus, where a warrant was granted by the Secretary of State to apprehend the author of the 'North Briton,' and the defendant, upon good ground of suspicion, apprehended the plaintiff, who proved that he was not the author, the defendant was held not to have acted in obedience to that warrant, and to be responsible without a justification therefrom."³

Buren v. Denman.

In *Buren v. Denman*,⁴ also arising out of the capture of the slaves of a Spaniard by the captain of one of her Majesty's ships, the Crown professed to adopt and ratify the alleged unlawful act. An action against the captain was brought at bar. As to the power of the Crown to ratify the wrongful act, Parke, B.,⁵ in

Judgment of Parke, B.

¹ 3 B. & Ald. 353, 1 St. Tr. N. S. 1345. Cp. *Fabrigas v. Mostyn*, 20 How. St. Tr. 81; 1 Sm. L. C. (9th ed.) 628. As to the right of bringing in foreign vessels engaged in the slave trade, see 1 Kent, Com. 191, 200; *The Antelope*, 10 Wheat. (U. S.) 66. As to a contract made by a British subject for the sale of slaves, *Santos v. Illidge*, 8 C. B. N. S. 861.

² 16 C. B. N. S. 310.

³ At 349, referring to *Leach v. Money*, 19 How. St. Tr. 1001; 3 Burr. 1692, 1742; 1 Wm. Bl. 555.

⁴ 2 Ex. 167; *Secretary of State for India v. Kamachee Baye Sahaba*, 13 Moo. P. C. C. 22, at 86.

⁵ The other judges were Alderson, Rolfe, and Platt, BB.

summing up, said: "On that subject I have conferred with my learned brethren, and they are decidedly of opinion that the ratification of the Crown, communicated as it has been in the present case,¹ is equivalent to a prior command. I do not say that I dissent; but I express my concurrence in their opinion with some doubt, because, on reflection, there appears to me a considerable distinction between the present case and the ordinary case of ratification by subsequent authority between private individuals. If an individual ratifies an act done on his behalf, the nature of the act remains unchanged, it is still a mere trespass, and the party injured has his option to sue either. If the Crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who commits the trespass. Whether the remedy against the Crown is to be pursued by Petition of Right, or whether the injury is an act of State without remedy, except by appeal to the justice of the State which inflicts it, or by application of the individual suffering to the Government of his country, to insist upon compensation from the Government of this—in either view, the wrong is no longer actionable. I do not feel so strong upon the point as to say that I dissent from the opinion of my learned brethren; therefore, you have to take it as the direction of the Court that, if the Crown, with knowledge of what has been done, ratified the defendant's act by the Secretaries of State or the Lords of the Admiralty, this action cannot be maintained." To this ruling a bill of exceptions was tendered, but was not carried further, and the law laid down in the summing up has been since frequently cited by text-writers and acquiesced in.²

If the ratification of the Crown may secure immunity for

¹ In documents from the Secretary of State for Foreign Affairs, the Lords of the Admiralty, and Secretary of State for the Colonial Department, on the report of the Governor of Sierra Leone and the defendant.

² As to this doctrine of ratification by the Crown, Lord Stowell held in the *Rolla*, 6 C. Rob. Adm. 364, that the notification of blockade, which is a high act of sovereignty by a commander in foreign stations, was legal, though it was without authority from the Government at home; and the fact of the Government having had time to repudiate, and not having done so, was evidence of recognition, though the commander had no original authority: and see the judgment of Willes, J., in *Phillips v. Eyre*, L. R. 6 Q. B. 1, at 24. In *Fletcher v. Braddick*, 2 B. & P. N. R. 182, at 187, Mansfield, C.J., said: "It is doubtful whether, by obeying the orders of the officer, it was meant that the officer should see to the navigation and direct the motion of the ship." The comment on this in *Abbott, Merchant Ships*, 8th to 12th eds. at 56 in 8th ed., is: "This decision is not perfectly satisfactory. . . . The case was hardly ripe for judgment until that doubt had been removed." Sir J. Hannen, in *The Tasmania*, 13 P. D. 110, at 118, says: "It is unnecessary for me to express an opinion whether the law as laid down in *Fletcher v. Braddick* is modified by *Quarman v. Burnett*, 6 M. & W. 499, and the cases which have followed that decision."

Act ordered by the Crown. an act otherwise wrongful, much more is an officer of the Crown saved from liability for an act ordered by Government or the Crown. The rule of law was laid down by Cockburn, C.J., in

Hodgkinson v. Fernie.

Hodgkinson v. Fernie,¹ a case where vessels chartered by Government as transports whilst in tow of a steamer commanded by a naval officer came into collision: "Where two vessels are chartered by the Government for an expedition such as that in question, one of the terms of the contract they enter into is, that they shall pay implicit obedience to the persons who command it; therefore, if one of them sustains damage from the other whilst acting in obedience to the orders of a superior officer, the owner of the vessel doing the damage cannot be held responsible in a court of law to the owner of the vessel to which the damage is done."

This necessarily follows from what was laid down in *Johnstone v. Sutton*:² "A subordinate officer must not judge of the danger, propriety, expediency, or consequence of the order he receives; he must obey: nothing can excuse him but a physical impossibility."

Malicious or oppressive execution of orders.

Another case that arises is where the orders of the Government in military or naval affairs are executed, maliciously and oppressively. In this event the general rule of law is that whenever any subject of England suffers damage for any illegal or injurious act of another short of felony, the law gives him a remedy by civil action, and without any previous conviction of the act.

Sutton v. Johnstone.

In *Sutton v. Johnstone*,³ the House of Lords, affirming the judgment of the Exchequer Chamber and reversing that of the Court of Exchequer, held that cases involving questions of military discipline and military duty alone are cognizable only by a military tribunal, and not by a court of law.⁴

In re Mansergh.

In *In re Mansergh*,⁵ Cockburn, C.J., thus marks the limits of the interference of the courts of law: "Where the civil rights of a person in military service are affected by the judgment of a military tribunal, in pronouncing which the tribunal has either acted without jurisdiction or has exceeded its jurisdiction, this Court [the Court of Queen's Bench] ought to interfere to protect

¹ 2 C. B. N. S. 415, at 436.

² *Johnstone v. Sutton*, 1 T. R. 493, 510, at 546; *Keighly v. Bell*, 4 F. & F. 763, per Willes, J., at 790.

³ *Johnstone v. Sutton*, 1 T. R. 493.

⁴ *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94; *Dawkins v. Lord Rokeby*, L. R. 7 H. L. 744. For what the term "Martial Law" signifies in Great Britain, see *Grant v. Gould*, 2 H. Bl. 69, at 99. For an account of the law as to the suppression of offences by Military Force and Martial Law, Stephen, *Hist. of Cr. Law*, vol. i. 200, 216.

⁵ 1 B. & S. 400, 406.

those civil rights—*e.g.*, where the rights of life, liberty, or property are involved, although I do not know whether the latter case could occur. Here, however, there was nothing of the sort, and the only matter involved was the military status of the applicant—a thing which depends entirely on the Crown, seeing that every person who enters into military service engages to be entirely at the will and pleasure of the Sovereign.”¹

The concluding expression of this statement might possibly be interpreted to import an implied contract. But between the Crown and the servant seeking service there is nothing in the nature of a contract even possible; for the power is inherent in the Crown, against which no coercive process could be made available and no contract in derogation would be recognized.²

In a series of cases culminating in *Dawkins v. Lord Rokeby*,³ in the House of Lords, it was held that even malice and falsehood alleged against a defendant are not sufficient to give the courts of law jurisdiction where the plaintiff and defendant are both military men, and the causes of action arise in the course of proceedings before a court of inquiry assembled in conformity with the Queen's regulations for the governing of the army. In delivering judgment in that case Lord Chancellor Cairns cited with approval the summing up of Mr. Justice Blackburn at the trial, that an “action would not lie, if the verbal and written statements were made by the defendant, being a military man, in the course of a military inquiry, in relation to the conduct of the plaintiff, being a military man, and with reference to the subject of that inquiry, even though the plaintiff should prove that the defendant had acted *malâ fide*, and with actual malice, and without any reasonable or probable cause, and with a knowledge that the statements so made and handed in by him as aforesaid were false.” Dawkins v.
Lord Rokeby.

It follows, from what has been said,⁴ that the authority of a court of ordinary civil or criminal jurisdiction is not affected by the fact that a person brought before it is in the naval or military service of the Crown; and that soldiers or sailors may recover even against their superior officers for wrongs not properly referable to their military or naval characters.⁵ Conclusion.

¹ As to this, see trials of Golding and others, 12 How. St. Tr. 1269.

² Poe's case, 5 B. & Ad. 681, and the cases collected in *Grant v. Secretary of State for India*, 2 C. P. D. 445.

³ L. R. 7 H. L. 744, 753. See the cases there cited in argument, and the judgment in the Ex. Ch. delivered by Kelly, C.B., L. R. 8 Q. B. 255; and cp. *Royal Aquarium and Summer and Winter Garden Society v. Parkinson* (1892), 1 Q. B. 431.

⁴ See per Cockburn, C.J., *In re Mansergh*, 1 B. & S. 400.

⁵ *Warden v. Bailey*, 4 Taunt. 67. See note as to this case, 13 Rev. R. 560.

Rule not
limited to
military and
naval officers.

In re Nathan.

This rule of the non-accountability of servants of the Crown is not limited to military and naval officers, but holds good in the case of all servants of the Crown.

Brett, M.R.'s,
judgment.

In re Nathan,¹ in the Court of Appeal, is the latest and most authoritative of a series of decisions upon the position of the great departments of internal administration. It was an application under 5 & 6 Vict. c. 79, s. 23, for a mandamus to the Commissioners of Inland Revenue to pay to the applicant the amount of probate duty overpaid by him. The objection was that the Crown cannot direct a writ of mandamus to itself, nor does a writ lie against servants of the Crown.² This objection was upheld on the ground that the money had been paid in contemplation of law into the hands of the Crown; as the duty had been paid to the Commissioners as *the mere servants of the Crown*; and, on the assumption that the statute did not establish a duty between the applicant and the Commissioners (in which event there would have been a right of action, and the remedy by mandamus would have been inappropriate), they were bound to obey the orders of the Crown alone. "If that be so, the meaning of the Act of Parliament, which says that these servants of the Crown are to pay back money which belongs to the Crown, and which is in the possession of the Crown and no longer in the actual possession of the Commissioners of Inland Revenue, is that it is a duty imposed upon them as servants of the Crown; and the duty imposed upon them is a statutory duty which they then owe to the Crown. The statute is also an enabling statute, because it enables them, without a direct order from the Crown in each particular case, to get back from some other department of the Executive, but which is after all from the Crown, and out of the general fund into which it has been paid, the money which is to be repaid to such persons as the prosecutor if they make out their case. Therefore, the right of this prosecutor (if any) seems to me³ to be a right against the Crown in respect of moneys which are in the hands of the Crown, and belong to the Crown. If that be so, then no action will lie, because an action will not lie against servants of the Crown. I have said that I do not think the statute gives any individual an action against the Commissioners for the reasons I have stated—viz., that it raises no relation between the applicant and the servants of the Crown; therefore the claim upon which the prosecutor insists must be a claim against the Crown. If the prosecutor, therefore,

¹ 12 Q. B. Div. 461.

² *Percival v. The Queen*, 3 H. & C. 217; *Executors of Perry v. The Queen*, L. R. 4 Ex. 27; *De Lancey v. The Queen*, L. R. 7 Ex. 140.

³ Brett, M.R., at 12 Q. B. Div. 472.

has any remedy in this case, it must be by petition of right."¹

The distinction pointed out seems to be between those cases where commissioners or others, acting as servants of the Crown, receive money either under the authority of an Act of Parliament, and without reference to the authority of the Crown, or in some capacity in which their relation to, and dependency on, the Crown is not invoked; when they are liable to ordinary process to secure its due application; and those cases where they are acting as servants of the Crown, and are amenable to the Crown, whose servants they are; when they are not amenable to the jurisdiction of the Courts otherwise than by petition of right.²

Two classes of cases:
I. Where commissioners act under parliamentary authority.

II. Where they act as the agents of the Crown.

The case of *The King v. Lords Commissioners of the Treasury*³ seems inconsistent with this, as there the Queen's Bench ordered a mandamus to go. In the subsequent case of *In re Hand*,⁴ Lord Denman, who delivered judgment in the earlier case, shews a disposition to limit the range of his decision; while, in Baron de Bode's case,⁵ Coleridge, J., speaks of the decision as "a much misunderstood instance," and as turning on the particular statute. In the *Queen v. Commissioners of Woods, &c.*, Lord Denman seemed to incline to his earlier view;⁶ and in *The Queen v. Lords of the Treasury*,⁷ under 1 & 2 Will. IV. c. 11, the earlier decision was followed. *Ex parte Walmsley*⁸ and *The Queen v. Lords Commissioners of the Treasury*⁹ are the other way. In the latter case Cockburn, C.J., expresses the governing principle as follows:¹⁰ "When a duty has to be performed (if I may use the expression) by the Crown, this Court (the Court of Queen's Bench) cannot claim even in appearance to have any power to

¹ In *The Queen v. Lambourn Valley Railway Company*, 22 Q. B. D. 463, where the prerogative writ of mandamus was sought to compel a railway company to register a transfer, Pollock, B., and Manisty, J., refused the application, on the ground that "numerous authorities establish the proposition," that the writ ought not to be granted "if the applicant has another and sufficient remedy by action." It having been argued that the principle laid down had a general effect in curtailing the jurisdiction of the Queen's Bench Division, Wright, J., in *Reg. v. The Vestry of St. George, Southwark*, 67 L. T. 412, explained the decision as applying only, "where the duty sought to be enforced as well as the right to claim are in substance of a private nature, and that it does not extend to any case where the duties sought to be enforced are merely of a public nature. If it were otherwise, a great part of the jurisdiction of this Court (the Q. B. D.) in granting writs of mandamus would be taken away; but I do not think that the intention of the learned judges who decided the Lambourn Valley case was to lay down such a doctrine."

² *The Queen v. Lords Commissioners of the Treasury*, L. R. 7 Q. B. 387.

³ 4 A. & E. 286.

⁴ 4 A. & E. 984, at 996.

⁵ 6 Dowl. Practice Cases, 776, at 792.

⁶ 15 Q. B. 761, at 770.

⁷ 16 Q. B. 357. See Blackburn, J., L. R. 7 Q. B. at 399, as to this decision.

⁸ 1 B. & S. 81.

⁹ L. R. 7 Q. B. 387. See Ruling Cases, Campbell, vol. i. 802.

¹⁰ L. c. at 394.

command the Crown. The thing is out of the question. Over the Sovereign we can have no power. In like manner, where the parties are acting as servants of the Crown and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction."¹ The law, then, may be considered settled in accordance with the view of Cockburn, C.J., and *The King v. Lords Commissioners of the Treasury*² overruled by *In re Nathan*³ in the Court of Appeal.⁴

Governors of dependencies.

The next class of public officers whose position we shall consider is that of Governors of dependencies.⁵

Fabrigas v. Mostyn.

Fabrigas v. Mostyn⁶ is an important decision on this branch of law. To an action for assault and false imprisonment, the defendant pleaded—first, not guilty, and, secondly, that he was Governor of a colony, and that the plaintiff was raising sedition and mutiny, in consequence of which he imprisoned him. The plaintiff put in issue the facts of the plea. The verdict went for the plaintiff. A bill of exceptions was tendered; two of the points it was sought to argue were first, that an action would not lie in England,⁷ and secondly, that no action at all could anywhere

Two points raised:
I. Action would not lie in England;

¹ Cp. *Mitchell v. The Queen*, 7 Times L. R. 480, 579.

² 4 A. & E. 286.

³ 12 Q. B. Div. 461, at 476. *The Queen v. The Secretary of State for War* (1891), 2 Q. B. 326. As to Lords of the Admiralty, see *Ex parte Ricketts*, 4 A. & E. 999; as to Commissioners of Woods and Forests, *Ex parte Reeve*, 5 Dowl. Pract. Cas. 668; and as to Commissioners of Excise, *The Queen v. Excise Commissioners*, 6 Q. B. 975. The immunity of executive officers in the United States from mandamus controlling a discretion is fully considered in *Gaines v. Thompson*, 7 Wall. (U.S.) 347. See for subsequent cases, *Carrick v. Lamar*, 116 U.S. (9 Davis) 423, and *Boydton v. Blaine*, 139 U.S. (32 Davis) 306, where the rule is said to be that the writ of mandamus cannot issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion; when a mere ministerial duty is imposed it is otherwise.

⁴ A Petition of Right does not lie against the Crown for money received under a treaty by the Government in respect of debts owing by subjects, of a foreign power, to certain of its own subjects: *Rustomjee v. The Queen*, 1 Q. B. D. 487, 2 Q. B. Div. 69. The same case is authority for the proposition that the Statute of Limitations does not apply to a Petition of Right.

⁵ The rule of the Civil Law is, *In jus vocari non oportet neque consulem neque præfectum neque prætorem neque proconsulem, neque cæteros magistratus qui imperium habent, qui coercere aliquem possunt, et jubere in carcerem duci; nec pontificem, dum sacra facit*: D. 2, 4, 2. As to Commissioners appointed in a conquered country, it is said, in arguing in *Elphinstone v. Bedreechund*, 2 St. Tr. N. S. 379, 452, 1 Knapp P. C. C. 316, at 346: "A Commissioner is at most only equal to a Governor; perhaps his office is rather inferior; at any rate, he cannot pretend to a greater degree of irresponsibility." Forsyth, *Cases and Opinions on Constitutional Law*, 64.

⁶ Cowp. 161, 20 How. St. Tr. 81, 1 Sm. L. C. (9th ed.) 628.

⁷ *Companhia de Moçambique v. British South Africa Company* (1892), 2 Q. B. 358, reversed (1893) App. Cas. 602. *Phillips v. Eyre*, L. R. 6 Q. B. 1, is the leading authority on what are the constituents to found an action of tort in England. It is there laid down (at 28) that two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England: *The Halley*, L. R. 2 P. C. 193. Secondly, the act must not have been justifiable by the law of the place where it was done: *Blad's case* (1674), 3 Swanst. 603; *Dobree v. Napier*, 2 Bing. N. C. 781, 3 St. Tr. N. S. 621; *Reg. v. Lesley*, Bell C. C. 220. *Phillips v. Eyre* and *The Halley* are followed and approved in the *M. Moxham*, 1 P. Div. 107. In *Ballantine v. Golding*, *Cook's Bankruptcy Law*, 487, Lord Mansfield laid down the rule that "what is a discharge of a debt in the country where it is contracted is a discharge of it every-

lie against the Governor of a colony any more than against the King himself. Lord Mansfield, C.J., answered these contentions as follows:¹ "The first point that I shall begin with is the sacredness of the person of the Governor. Why, if that was true, and if the law was so, he must plead it. This is an action for false imprisonment; *prima facie* the Court has jurisdiction. If he was guilty of the fact, he must shew a special matter that he did this by a proper authority. What is his proper authority? The King's commission to make him Governor. Then he certainly must plead it; but, however, I will not rest the answer upon that. It has been singled out that in a colony that is beyond the seas, but part of the dominions of the Crown of England, though actions would lie for injuries committed by other persons, yet it shall not lie against the Governor. Now, I say for many reasons, if it did not lie against any other man, it shall most emphatically lie against the Governor. In every plea to the jurisdiction you must state a jurisdiction; for, if there is no other method of trial, that alone will give the King's Courts jurisdiction." "In every case to repel the jurisdiction of the King's Courts you must shew a better and a more proper jurisdiction."² Now, in this case no other jurisdiction³ is shewn even by way of argument; and it is most certain that if the King's Courts cannot hold plea in such a case, there is no other Court upon earth that can do it; for it is truly said that a Governor is in the nature of a Viceroy, and, of necessity, part of the privileges of the King are communicated to him during the time of his government. No criminal prosecution lies against him, and no civil action will lie against him; because what would the consequence be? Why, if a civil action lies against him, and a judgment (is) obtained for damages, he might be taken

II. No action would lie against the Governor of a colony.

Dictum of Lord Mansfield: "A Governor is in the nature of a Viceroy."

where," and, by parity of reasoning, where an obligation *ex delicto* to pay damages is discharged and avoided by the law of the country where it is made, the accessory right of action is in like manner discharged and avoided. To shew, however, that an action is pending abroad for a wrong is no ground for staying proceedings in this country, see *Cox v. Mitchell*, 7 C. B. N. S. 55; *Mutrie v. Binney*, 35 Ch. Div. 614, 623. In *Potter v. Brown*, 5 East 124, at 131, Lord Ellenborough, C.J., said: "We always import together with their persons the existing relations of foreigners, as between themselves, according to the laws of their respective countries, except, indeed, where those laws clash with the rights of our own subjects here, and one or other of the laws must necessarily give way, in which case our own is entitled to the preference." See Story, *Conflict of Laws*, § 326; *Cail v. Papayanni*, 1 Moo. P. C. C. N. S. 471, at 483; *Scott v. Seymour*, 1 H. & C. 219; *Dennick v. Railroad Company*, 103 U. S. (13 Otto) 11; *The Indian Chief*, 3 C. Rob. Adm. 12, at 29; per Sir William Scott. See also per Fry, L.J., *Companhia de Moçambique v. British South Africa Company* (1892), 2 Q. B. 414. Forsyth, *Cases and Opinions on Constitutional Law*, 188, 217; *Rosses v. Bhagvat Sinhjee*, 19 Rettie 31.

¹ 20 How. St. Tr. 228.

² Case of the Hon. Rob. Johnson, 6 East 583; Case of the Kinlochs, 18 How. St. Tr. 395. See, however, *Companhia de Moçambique v. British South Africa Company*, in the House of Lords, *supra*.

³ Butler's Note Co. Litt. 391a.

up and put in prison on a *capias*; and, therefore, locally during the time of his government the Courts in the island cannot hold plea against him." "If he is out of the government he leaves it; he comes and lives in England, and he has no effects there to be attached; then there is no remedy whatsoever, if it is not in the King's Courts."

Lord Mansfield's *dictum* considered by the Privy Council in *Cameron v. Kyte*.

The *dictum* of Lord Mansfield that "a Governor is in the nature of a Viceroy" may be considered as not to be law. The question arose in *Cameron v. Kyte*,¹ where Parke, B., in giving the judgment of the Privy Council, said: "If a Governor had, by virtue of that appointment, the whole sovereignty of the colony delegated to him as a Viceroy, and represented the King in the government of that colony, there would be good reason to contend that an act of sovereignty done by him would be valid and obligatory upon the subject living within his government, provided the act would be valid if done by the Sovereign himself, though such an act might not be in conformity with instructions which the Governor had received for the regulation of his own conduct. The breach of those instructions might well be contended on this supposition to be matter resting between the Sovereign and his deputy, rendering the latter liable to censure or punishment, but not affecting the validity of the act done. But if the Governor be an officer merely with a limited authority from the Crown, his assumption of an act of sovereign power, out of the limits of the authority so given to him, would be purely void, and the Courts of the colony over which he presided could not give it any legal effect. We think the office of Governor is of the latter description, for no authority or *dictum* has been cited before us to shew that a Governor can be considered as having delegation of the whole royal power in any colony as between him and the subject when it is not expressly given by his commission;² and we are not aware that any commission to colonial Governors conveys such an extensive authority."³

Dictum of Lord Mansfield dissented from in *Hill v. Bigge*.

In *Hill v. Bigge*,⁴ again, the *dictum* of Lord Mansfield was expressly dissented from by Lord Brougham,⁵ who delivered the

¹ 3 Knapp P. C. C. 332, 3 St. Tr. N. S. 607.

² *L. c.*, at 343, 344. See *In re Seizure of Slaves at Sierra Leone*, Br. & Lush. 148.

³ See Chalmers, *Opinions of Eminent Lawyers*, vol. i. 231. *The Rolla*, 6 C. Rob. Adm. 364.

⁴ 3 Moo. P. C. C. 465, 476, 478, 4 St. Tr. N. S. 723; there were present Lord Brougham, Lord Campbell, Erskine, J., and Dr. Lushington.

⁵ "With the most profound respect for the authority of that illustrious judge (Lord Mansfield), it must be observed that, as has been shewn, the Governor being liable to process during his government would not of any necessity follow from his being liable to action, and that the same argument might be used to shew that an action lies not against persons enjoying undoubted freedom from arrest by reason of privilege": 3 Moore P. C. C. at 481. The status of Colonial Governors was exhaustively considered in *Toy v. Musgrove*, 14 Vict. L. R. 346.

judgment of the Privy Council. The action was for a private debt contracted by the defendant in England before he was Governor, but on which he was sued in the Courts of the colony, and thereupon claimed, as a personal privilege of the Governor, immunity from being called to answer there. Lord Brougham said: "If it be said that the Governor of a colony is quasi-Sovereign, the answer is that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his commission, and being only the officer to execute the specific powers with which that commission clothes him." "His being liable to be taken in execution is not the necessary consequence of his being liable to have a judgment against him. There were anciently more instances than happily now of persons privileged from legal process; but there still are some such exemptions, as privilege of peerage and of Parliament,¹ and of persons in attendance upon the Sovereign and upon Courts of Justice. None of these privileges protect from suits, all more or less protect from personal arrest in execution, or judgment recovered by suit. Indeed, the old, and we may now say obsolete, writ of protection which the King granted to his servants and debtors, purported to be a protection from all pleas and suits; yet the Courts held that no one should thereby be delayed in his action, but only that execution should be stayed after judgment."² "It therefore is not at all necessary that, in holding a Governor liable to be sued, we should hold his person liable to arrest while on service—that is, while resident in his government. It is not even necessary that we should meet the suggestion of his goods, in all circumstances, being liable to be taken in execution—though that is subject to a different consideration."

In *Phillips v. Eyre*,³ a colonial Act of Indemnity had been passed in respect of certain alleged wrongful acts that had been done by the Governor. This Act of Indemnity was held an answer to an action brought in England; on the principle that, to found any right of action, it is necessary to show that the acts out of which the action arises cannot be justified by the law of the place where they are done, and the Act of Indemnity, by which the elements necessary to constitute a right of action were removed, was not necessarily and in its nature unjust.

The Privy Council had again the question of a Governor's

¹ See *In re Mr. Long Wellesley*, 2 R. & M. 639, 3 St. Tr. N. S. 911.

² Cro. Jac. 419; 25 Edw. III. stat. 5, c. 19; *Pilkingdon v. Stanhope* (1694), 2 Vern. 317. See Bracton (Twiss), vol. iv. 137, vol. v. 159. There is an interesting account of *essoins* in Reeves, *Hist. Eng. Law* (2nd ed.) vol. i. 405-417; Vin. Abr. *Essoin*.

³ (1869) L. R. 4 Q. B. 225; Ex. Ch. 6 Q. B. 1.

Musgrave v.
Pulido.

authority before it in the case of *Musgrave v. Pulido*.¹ An action of trespass was brought in Jamaica against the Governor for seizing and detaining a schooner, of which the plaintiff was charterer. The plea was in substance a plea of privilege and to the jurisdiction, setting out that the defendant was the Governor of Jamaica, and that the acts in respect of which the action was brought were done by him in that capacity. After a review of the cases, the judgment of the Privy Council proceeds as follows: "It is apparent from these authorities that the Governor of a colony (in ordinary cases) cannot be regarded as a Viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him. Let it be granted that, for acts of power done by a Governor under and within the limit of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of State. When questions of this kind arise, it must necessarily be within the province of municipal Courts to determine the true character of the acts done by a Governor, though it may be that, when it is established that the particular act in question is really an act of State policy done under the authority of the Crown, the defence is complete, and the Courts can take no further cognizance of it."²

Lord-
Lieutenant
of Ireland.
*Tandy v. Lord
Westmoreland.*

The operation of the principle here indicated is shewn in *Tandy v. Lord Westmoreland*,³ an action brought against the Lord-Lieutenant of Ireland by Napper Tandy. The Irish Court of Exchequer, on motion by the Attorney-General, and acting on facts disclosed in a warrant of attorney from Napper Tandy to Dowling, his attorney, ordered the subpoena issued against the Lord-Lieutenant to be quashed, on the ground that the facts so disclosed shewed that he was sued for an act done by him in his capacity of Lord-Lieutenant, and that such an action is not maintainable. This decision was followed in *Luby v. Lord Wodehouse*,⁴

*Luby v. Lord
Wodehouse.*

¹ (1879) 5 App. Cas. 102, 111.

² I am not aware of any English case where the plea of Act of State has been held good against a subject. "Act of State can apply only to acts which affect foreigners." Stephen, *Hist. Crim. Law*, vol. ii. 61, IV. Acts of State. *Walker v. Baird* (1892), App. Cas. 491. See *Ruling Cases*, Campbell, vol. i. 819-827, where the Indian cases on Act of State are discussed by Mr. C. P. Ilbert.

³ 27 How. St. Tr. 491, at 1264.

⁴ 17 Ir. C. L. R. 618. See the comment on the accuracy of this case, per Lord Brougham, *Hill v. Bigge*, 4 St. Tr. N. S. 723, at 733, and what is said of this and the preceding case in *Musgrave v. Pulido*, 5 App. Cas. 102, at 111.

where the Attorney-General, for the defendant, moved, on affidavits filed by the plaintiff, that proceedings be stayed or the writ be taken off the file, on the ground that the facts set out in the affidavits shewed that the action was brought against the defendant for acts done by Lord Wodehouse *quâ* Lord-Lieutenant, and not for a personal act done by him as a private individual; and that, therefore, he was not amenable to this or to any other Court. The Court, being satisfied from the materials of the accuracy of the contention, granted the motion. In a third Irish case,¹ the motion was supported by an affidavit made by the Under-Secretary, which was answered by the plaintiff; here, too, the Court made the order.

Sullivan v. Earl Spencer.

It appears, then, from these and other cases,² that, in actions brought against the Governors of dependencies, it is necessary, in order to prevent the ordinary Courts of law from taking cognizance of them, that—first, the facts out of which the proceedings arise should be laid before the Court, apparently in any form by which the Court can sufficiently inform itself; and, secondly, the Court, on inquiry into the nature of the acts complained of, should be satisfied that they bear the character of acts of State. On being so satisfied, it will take no further cognizance of them.³

Some remarks of Blackburn, J., charging the grand jury in *Regina v. Eyre*,⁴ may here with advantage be noted: "The powers of a Governor of a colony, are different from and more extensive than, those of a lord-lieutenant of a county of England or a mayor of a borough in England, in which a riot or insurrection has broken out; and, consequently, both what he may be authorized to do and what he may be punishable or blameable for if he does not do, is different in his case from theirs, but the principle upon which the responsibility of each officer depends is, I think, the same. The officer is bound to exercise the powers which the law gives him in the manner which, under the circumstances, is right;

Charge of Blackburn, J., in Regina v. Eyre.

¹ *Sullivan v. Earl Spencer*, Ir. R. 6 C. L. 173. Anson, *Law and Custom of the Constitution*, vol. ii. 455. As to the liability of a person doing a wrongful act under the King's orders, Chitty, *Prerog.* 90; Dicey, *Law of the Constitution* (4th ed.), 303 *et seqq.*; Anson, vol. ii. 42; Proceedings on the Habeas Corpus brought by Sir Thomas Darnel, &c., 3 How. St. Tr. 1-234; Hallam, *Const. Hist.* vol. i. (8th ed.), 383 *et seqq.*

² *Rajah of Tanjore's case*, 13 Moo. P. C. C. 22; *Forester and others v. Secretary of State for India*, L. R. Ind. App. Sup. 10; *Nabob of Carnatic v. East India Company*, 1 Ves. Jun. 370; *Ex-Rajah of Coorg v. East India Company*, 29 Beav. 300; *Rajah Salig Ram v. Secretary of State for India*, L. R. Ind. App. Sup. Vol. 119—all cited in *Musgrave v. Pulido*, 5 App. Cas. 102; *Basham v. Lumley*, 2 St. Tr. N. S. 322.

³ As to Act of State see note 2 on preceding page. As to the criminal liability of a Governor, see 11 Will. III. c. 12; 42 Geo. III. 8c. 5; *Rex v. Wall*, 28 How. St. Tr. 51; *Rex v. Picton*, 30 How. St. Tr. 225; *Reg. v. Eyre*, Finlason, *History of the Jamaica Case*. See also proceedings against Col. Fiennes for cowardly surrendering the City and Castle of Bristol, 4 How. St. Tr. 186. In the United States it is assumed as a principle flowing from the sovereignty of the United States that the officers of the Government are not subject to suits for acts in the regular discharge of their official duties; *Opinions of U. S. Attorneys-General*, i. 457.

⁴ *Finlason's Report*, 55.

and if he fails to exercise those powers, if something which he ought to do is not done by him, and mischief occurs, then, if the circumstances are such as to make it his duty to exercise them, and he does not do it, he neglects his duty; and if the neglect is such and to such an extent as amount to criminal negligence, then he is guilty of a crime for which he may be indicted."¹

Judicial
officers.

Seaman v.
Patten.

The next class of public officers to consider are those clothed with judicial duties. The best description of judicial duties may be extracted from two American cases. In *Seaman v. Patten*,² Livingston, J., said: "An officer acting under a commission from Government, who is enjoined by law to the performance of certain things, if in his judgment or opinion the requisites therein mentioned have been complied with, and inhibited under the like exercise of his own discretion from doing other things; who is sworn to discharge these duties to the best of his ability, and exposed also to penalties as well for negligence as for acting where he ought not, is not answerable to a party who may consider himself aggrieved for an omission arising from a mistake or a mere want of skill, if there is no bad faith, corruption, malice, or some misbehaviour or abuse of power." The officer in the case was an "inspector-general of provisions," and therefore not a Court of record.

Vanderheyden
v. Young.

In *Vanderheyden v. Young*, Spencer, J., said:³ "It is a general and sound principle that whenever the law vests any person with a power to do an act, and constitutes him a judge of the evidence on which the act may be done, and at the same time contemplates that the act is to be carried into effect through the instrumentality of agents, the person thus clothed with power is invested with discretion, and is, *quoad hoc*, a judge. His mandates to his legal agents on his declaring the event to have happened, will be a protection to those agents: and it is not their duty or business to investigate the facts thus referred to their superior, and to rejudge his determination."⁴

¹ In *Pinney's Case*—the Bristol Riots, 3 St. Tr. N. S. 11, 510—Littledale, J., says: "A public officer in point of law 'is bound to hit the exact line between an excess and doing what is sufficient.'"

² 2 Caines (N. Y.) 312. A fish inspector is a judicial officer: *Fath v. Koepfel*, 7 Am. St. R. 867.

³ 11 Johns. (Sup. Ct. N. Y.) 150, at 158.

⁴ See *Barnardiston v. Soame*, 6 How. St. Tr. 1063; and 7 & 8 Will. III. c. 7. The first reason of North, C.J., at 1096, is that the sheriff acts as judge in declaring the majority of votes, and *therefore* no action will lie, though his action is charged to be malicious. "If a justice of the peace commit any error within his jurisdiction, I know of no case where such an action will lie against him; as if he convict upon evidence which turns out not to be true, and an action of false imprisonment be brought against him, the conviction is conclusive evidence in his favour. As to the case of a revenue officer, he is a mere volunteer, and therefore he is liable for any mistakes he may make. But this is more like the case of a sheriff, who is a ministerial officer. If, for instance, a writ of *fi. fa.* be directed to him, he is bound to act; and when property is disputed, if he return *nulla bona*, and happen to be mistaken in point of law, it is a false return": per Wilson, J., in *Drewe v. Coulton*, cited in a note to

Thus, a broker who undertook to give his opinions upon fruit submitted to him was held to act as a quasi-arbitrator;¹ so was an average adjuster, to whom the parties to a suit agreed to refer their dispute,² and so is an architect, in an action by the builder against him for negligence,³ unless fraud and collusion supervene.⁴

The principle of the immunity of judges for judicial acts is Early law. stated as early as the Book of Assize, 27 Edward III. 135, pl. 18. And the same protection was extended to grand jurors; for in 47 Edward III. 16, pl. 30, a writ of conspiracy⁵ was sued in the King's Bench, and the defendants pleaded they were indictors therein, which was held to be a good plea. In 9 Edward IV. 3 pl. 10, it was held by Littleton, J., that an action for assault and battery would not lie against a justice of the peace for what he did as judge of record.⁶

Staundforde, in his "Plees del Coron,"⁷ lays down that no Staundforde, prosecution for conspiracy lies against grand jurors; for it shall "Plees del Coron." not be intended that what they did by virtue of their oaths was false and malicious; and that the same law applies to a justice of the peace, for he shall not be punished as a conspirator for what he does in open session as a justice.

In Floyd and Barker's case⁸ the subject was considered by the Floyd and Barker's case. two Chief Justices (Popham and Coke), the Chief Baron (Fleming⁹), the Lord Chancellor Egerton, and all the Court of Star Chamber. "It was agreed that insomuch as the judges of the realm have

Harman v. Tappenden, 1 East 555, at 563. An information will not be granted against magistrates, though they mistake the law, if they do not act corruptly. *The King v. Jackson*, 1 T. R. 653; *Tozer v. Child*, 7 E. & B. 377; *Pickering v. James*, L. R. 8 C. P. 489, at 509.

¹ *Pappa v. Rose*, L. R. 7 C. P. 32, 525.

² *Tharsis Sulphur and Copper Company v. Loftus*, L. R. 8 C. P. 1.

³ *Stevenson v. Watson*, 4 C. P. D. 148. *Tullis v. Jackson* (1892), 3 Cn. 441. If an arbitrator along with his award delivers a paper containing his reasons, the paper will be taken as part of the award; and if the reasons are wrong in law, the award will be set aside. *Kent v. Elstob*, 3 East 18, referred to by Lord Eldon, C., *Young v. Walter*, 9 Ves. 364. But an arbitrator may be called as a witness in legal proceedings to enforce his award, and may be asked questions as to what passed before him and what matters were presented for his consideration, but not as to what passed in his mind in making his award. *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *In re Whiteley and Roberts's Arbitration* (1891), 1 Ch. 558. To the same effect are the Scotch cases; *M'Millan v. Free Church* (1862), 24 Dunlop 1282. See *East and West India Dock Company v. Kirk*, 12 App. Cas. 738. In *Turner v. Goulden*, L. R. 9 C. P. 57, a "mere valuer" is distinguished from an arbitrator; and cp. *In re an arbitration between De Morgan, Snell & Co. and the Rio de Janeiro Mills and Granaries, Ltd.*, 8 Times L. R. 292 (C. A.).

⁴ *Batterbury v. Vyse*, 2 H. & C. 42; *Ludbrook v. Barrett*, 46 L. J. C. P. 798.

⁵ *Fitzh. De Nat. Brev. Writ of Conspiracy*.

⁶ There is a law of Alfonso V. of Aragon in 1442 saying that the justicia shall continue in office during life, removable only, on sufficient cause, by the king and the cortes united; Prescott, *History of Ferdinand and Isabella*, vol. i. 86, which is claimed to be "the most ancient precedent in favour of the establishment of an independent judiciary." 1 Kent, Com. 293.

⁷ (1583), at 173.

⁸ 12 Rep. 23, 25. See Buller's argument, *Fabrigas v. Mostyn*, 20 How. St. Tr. 81, at 204, and Lord Mansfield's judgment, at 228.

⁹ The same year made Chief Justice of the King's Bench.

the administration of justice, under the King, to all his subjects, they ought not to be drawn into question for any supposed corruption, which extends to the annihilating of a record, or of any judicial proceedings before them, or tending to the slander of the justice of the King, which will trench to the scandal of the King himself, except it be before the King himself;¹ for they are only to make an account to God and the King, and not to answer to any suggestion in the Star Chamber, for this would tend to the scandal and subversion of all justice. And those who are the most sincere would not be free from continual calumniation, for which reason the orator said well, *Invigilandum est semper, multæ insidiæ sunt bonis*. And the reason and cause why a judge, for anything done by him as a judge, by the authority which the King hath committed to him, and as sitting in the seat of the King (concerning his justice), shall not be drawn in question before any other judge for any surmise of corruption, except before the King himself, is for this; the King himself is *de jure* to deliver justice to all his subjects; and for this that he himself cannot do it to all persons, he delegates his power to his judges, who have the custody and guard of the King's oath. And, forasmuch as this concerns the honour and conscience of the King, there is great reason that the King shall take account of it, and no other."² Lord Chief Justice North, in his opinion to the House of Lords in *Barnardiston v. Soame*,³ puts the matter more forcibly: "No action will lie against a judge for what he does judiciously, though it should be laid *falsò malitiosè et scienter*; as appears in 12 Co. Rep. 24. They who are intrusted to judge, ought to be free from vexation, that they may determine without fear; the law requires courage in a judge, and therefore provides security for the support of that courage."

Resolution in
Bushell's case.

In Bushell's case⁴ it was resolved by all the judges of England (except Kelynge, C.J.) that a juryman cannot lawfully be punished by fine, imprisonment, or otherwise for finding

¹ In the time of Edward III., Thorpe, C.J., was degraded for taking bribes: 3 Co. Inst. 146; 1 Campbell, Chief Justices, 90, 91. Y. B. 14 & 15 Edw. III. Pike, Intro. xxi., liii., gives an account of the trial of many judges by Special Commission for misconduct in office. As to judges convicted of bribery, see 4 Bl. Com. 139; Lord Bacon's case, 2 How. St. Tr. 1087; Lord Macclesfield's case, 16 How. St. Tr. 767. For cases of the sale of judicial offices see 1088, and for arguments of the legality of it, 1109, 1273. See Vin. Abr. Judges.

² *Aire v. Sedgwick*, 2 Rolle Rep. 197; *Basten v. Carew*, 3 B. & C. 649.

³ 6 How. St. Tr. 1063, at 1096.

⁴ (1670) Vaughan 135; 6 How. St. Tr. 999; see the comments on this case in the argument of the Attorney-General in *Stockdale v. Hansard*, 3 St. Tr. N. S. 723, at 768. *Bradley v. Fisher*, 13 Wall. (U. S.) 335; *Yates v. Lansing*, 5 Johns. (Sup. Ct. N. Y.) 282, 6 Johns. 337, 9 Johns. 395, may be referred in this connection for the judgment of Kent, C., considering the English authorities, and where 31 Car. II. c. 2—the Habeas Corpus Act, 1679—is said to be the first instance in the History of the English law where judges of the highest common law tribunal sitting and acting not in a ministerial but a judicial capacity are made responsible in actions by private suitors for the exercise of their discretion. *Yates v. The People*, 6 Johns. (Sup. Ct. N. Y.) 337.

against the evidence or against the direction of the judge, even though his finding is alleged to be given corruptly and knowing the evidence to be full and manifest.¹ After Bushell's case came *Hammond v. Howell*.² The defendant was Recorder of London, and, as one of the judges of oyer and terminer, fined and imprisoned the plaintiff, because he had brought in a verdict as a juror contrary to the direction of the Court and the evidence. The act of the defendant was admitted to have been illegal; yet the Court held that, in a conflict of principles, the bringing the action was a greater offence than the imprisonment of the plaintiff; that no action would lie against a judge for a wrongful commitment any more than for an erroneous judgment; that, though the defendant acted erroneously, he acted judicially; and that, if what he did was corrupt, complaint might be made to the King; if erroneous, it might be reversed.³

The case of *Groenvelt v. Burwell*⁴ should be noticed for the judgment of the King's Bench, delivered by Holt, C.J., who went at large into the cases and shewed that judges are not liable to an action by the party for what they do as judges; that no averment is admissible that a judge of record has acted against his duty; that, even if a justice of the peace should affirm that, upon his view, as against law which in fact is not so, he cannot be drawn in question, for his decision is a judicial act; that, in like manner, jurors are not responsible for their verdicts, because they are judges of fact; and "that it would expose the justice of the nation, and no man would execute the office of a judge upon peril of being arraigned by action or indictment for every judgment he pronounces."⁵

Passing over a number of earlier cases we come to the case of

¹ The verdict of a jury might anciently be set aside by an attain; as to which see Finch, Law, 484; Vin. Abr. Attaint; Hawk. P. C. bk. 2, c. 22, s. 20. By statute 11 Hen. VI. c. 4, the plaintiff in an attain could recover his damages and costs against the jurors and defendants; see also 15 Hen. VI. c. 5; Forsyth, Hist. Trial by Jury, 180. Where a writ of attain lay, which was not in criminal cases (Hawkins, P. C. bk. i. c. 72, s. 5), a jury of twenty-four tried the issue whether the previous jury had sworn falsely. The verdict of the second jury concluded the matter. The writ of attain was abolished 6 Geo. IV. c. 50; sec. 61 saves the liability of those guilty of the offence of embracery: 4 Steph. Com. 262; 1 Russell, Crimes (5th ed.), 360. As to juries generally, see Bushell's case, 6 How. St. Tr. 999, and the notes, also Historical Observations on the respective functions of the judge and the jury, Law Mag. and Rev. (1865), vol. xix. 1. For a comprehensive collection of authorities on the powers, qualifications, immunities, and responsibilities of grand juries, see Commonwealth v. Green, 12 Am. St. R. 894, and note 900-919; also Commonwealth v. Brown, 147 Mass. 585, 9 Am. St. R. 736, and note 743-760; Bro. Abr. Jurours; Com. Dig. Enquest; Bac. Abr. Juries; Steph. Hist. Crim. Law, vol. i. 251-272, 301-307, 566-576; Reeves, Hist. of the Eng. Law (2nd ed.) vol. ii. 137, 267; Gneist, Hist. of the Engl. Const. *passim*. See *post*, 306.

² 1 Mod. 184; 2 Mod. 218.

³ The practice of fining juries is well treated, 2 Hale P. C. 158. There is also a note on the same subject, collecting the authorities, to Penn & Mead's case 6 How. St. Tr. 951, at 967. See also 4 Bl. Com. 361.

⁴ 12 Mod. 386; 1 Salk. 396; 1 Ld. Raym. 454, summarized 20 How. St. Tr. 203.

⁵ See also Miller v. Seare, 2 Wm. Bl. 1145; Mostyn v. Fabrigas, 1 Cowp. 172.

Kemp v.
Neville.

Kemp v. Neville,¹ where Erle, C.J., delivered an elaborate judgment, in which all the learning on the subject is passed under review. His conclusions are—first, that a judicial officer cannot be sued for an adjudication, according to the best of his judgment, upon a matter within his jurisdiction; and, secondly, that a matter of fact adjudicated by him cannot be put in issue in an action brought against him for what he has so done. And it will not found jurisdiction in a civil suit to allege that what has been done has been done maliciously and corruptly,² though judges of inferior courts are under the supervision of the Queen's Bench Division, where they may be made amenable to punishment for corruption or gross misconduct.³

Distinction
between a
judge of a
superior court;
and a judge of
an inferior
court.

An important distinction must be noted between judges of superior courts—that is, with power to fine and imprison, and hence of record⁴—and judges of inferior courts, with regard to their immunity from process for what is done by them while purporting to act in the discharge of the duties of their office. The Courts take judicial cognizance of the position and dignity of the one; but will require to be informed on the pleadings of the jurisdiction of the other.⁵

Calder v.
Halket.
Judgment by
Parke, B.

When once the quality of the act called in question is determined, the rule applicable to it is clear; it is thus laid down by Parke, B., in delivering the judgment of the Judicial Committee of the Privy Council in *Calder v. Halket*:⁶ “English judges when they act wholly without jurisdiction, whether they may suppose that they had it or not, have no privilege; and the justices of the peace, whether acting as such, or in their judicial character, in cases of summary conviction, have no other than that of having notice

¹ (1861) 10 C. B. N. S. 523; *Hamilton v. Anderson*, 3 Macq. (Sc. App. Cas.) 363. The powers of a visitor of an eleemosynary corporation are judicial. *Philips v. Bury*, *Skinner*, 447, 1 Lord Raym. 5.

² *Hagart's Trustees v. Hope* (1824), 2 Shaw (Sc. App. Cas.) 125, at 143, an action by an advocate against the Lord President of the Court of Session for words applied to him while the Lord President was acting in a judicial capacity. *Fray v. Blackburn*, 3 B. & S. 576: in a note at 578 the authorities are collected. *Thomas v. Churton*, 2 B. & S. 475; *Scott v. Stansfield*, L. R. 3 Ex. 220, adopted by Lord President Inglis, in *Harvey v. Dyce*, 4 Rettie 265. In *M'Murphy v. Campbell* (1887), 14 Rettie 725, at 728, Lord Young said: “It is not in the public interest that an action for libel should lie against a public officer for a report made in discharge of his duty to his superior officer.” *Innes v. Adamson*, 17 Rettie 11; *Haggard v. Pelicier Frères* (1892), App. Cas. 61; *Bradley v. Fisher*, 13 Wall. (U.S.) 335.

³ See, per Holt, C.J., *Groenvelt v. Burwell*, 1 Ld. Raym. 454, at 467.

⁴ *Ex parte Ramshay*, 18 Q. B. 173; *The Queen v. Marshall*, 4 E. & B. 475; *In re Hull*, 9 Q. B. D. 689; *The Queen v. Badger*, 4 Q. B. 468.

⁵ *Dutton v. Howell*, Show. P. C. (Loveland's edition), 31, at 43; *Dicas v. Lord Brougham*, 6 C. & P. 249, see Kelly's argument at 265; 3 St. Tr. N. S. 570; *Taaffe v. Downes*, 3 Moo. P. C. C. 36, n.; *Houlden v. Smith*, 14 Q. B. 841.

⁶ 3 Moo. P. C. C. 28, at 75; 4 St. Tr. N. S. 482; *Beaurain v. Scott*, 3 Camp. 387, with note referring to *Boraine's case*, 16 Ves. 346; *Ackerley v. Parkinson*, 3 M. & S. 411; *Ferguson v. Kinnoull*, 9 Cl. and F. 251, 4 St. Tr. N. S. 785; *Garnett v. Ferrand*, 6 B. & C. 611, is an action against a coroner for turning a person out of the room where an inquiry was being held; *Willis v. Maclachlan*, 1 Ex. D. 376. For wrongful exercise of jurisdiction see *In re Melina Trepanier*, 12 Can. S. C. 111.

of action, a limitation of time for bringing it, a restriction as to venue, the power of tendering amends and of pleading the general issue, with certain advantages as to costs.”¹ “An act of a judicial nature, and whether there was any irregularity or error in it or not, would be dispunishable by ordinary process at law; but the protection would clearly not extend to a judicial act done wholly without jurisdiction.” “It is well settled² that a judge of a Court of Record in England with limited jurisdiction, or a justice of the peace acting judicially with a special and limited authority, is not liable to an action of trespass for acting without jurisdiction, unless he had the knowledge, or the means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction. Thus, in the elaborate judgment of Mr. Baron Powell in *Gwynn v. Poole*³ it is laid down that a judge of a Court of Record in a borough was not responsible as a trespasser unless he was cognizant that the cause of action arose out of the jurisdiction, or at least that he might have been cognizant but for his own fault; which last proposition Mr. Baron Powell illustrates by a reference to the case of the Marshalsea Court, which had jurisdiction only in certain cases where the King’s servants were parties, who, being all enrolled, the judge ought to have had a copy of the enrolment, and so would have known the character of the parties. ‘It is true,’ says Mr. Baron Powell (speaking of the case of a borough court), ‘that the cause of action does not arise within the jurisdiction of the Court, as it ought to do; but as the judge cannot know that, except by the plaintiff or defendant, until he knows it, the rule shall be in this case as in others, *Ignorantia facti excusat*.’ Mr. Baron Powell lays down the same rule as to a party; but his opinion in that respect is disapproved by Lord Chief Justice Willes in *Moravia v. Sloper*,⁴ but not so far as it relates to a judge or officer. The like rule has been followed in the case of magistrates acting under the special power of Acts of Parliament, who are not liable as trespassers if they have jurisdiction to inquire into the facts stated before them, and nothing appears on one side or another to shew their want of jurisdiction.’ It is clear, therefore, that a judge is not liable in trespass for want of jurisdiction unless he knew or ought to have known of the defect; and it lies on the plaintiff, in every such case, to prove that fact.”

The law as thus laid down is further illustrated by the case of *Houlden v. Smith*.⁵ The plaintiff, who dwelt and carried on

¹ Cp. Public Authorities Protection Act, 1893, 56 & 57 Vict. c. 61.

² 3 Moo. P. C. C. 28, at 77, 4 St. Tr. N. S. 482, at 494.

³ 2 Lutw. (C. P.) 1560, at 1566.

⁴ Willes 30.

⁵ *Pike v. Carter*, 3 Bing. 78; *Lowther v. Earl of Radnor*, 8 East 113.

⁶ 14 Q. B. 841, 851. As to the authority of this case, see what said is by Kelly, C.B.,

Judgment of
Patteson, J.

business at Cambridge, out of the jurisdiction of the Spilsby County Court, was sued in that court, by leave of the judge, under 9 & 10 Vict. c. 95, s. 60, the cause of action having arisen within jurisdiction of the Court. Judgment was duly obtained against him. Afterwards, while the plaintiff still dwelt and carried on business at Cambridge, a judgment summons was issued by order of the judge of the Spilsby Court, under section 98, calling upon the plaintiff to be examined as to his estate and effects. The plaintiff not appearing, the judge, knowing the facts, but believing nevertheless that he had authority, made an order that the plaintiff should be committed for his contempt. The plaintiff brought an action of trespass for false imprisonment. A verdict was found for the plaintiff, subject to the opinion of the Court on the question of law. After hearing argument, the considered judgment of the Court was delivered by Patteson, J., holding the action maintainable: "That this commitment was without jurisdiction," he says, "is plain; that the defendant ordered it under a mistake of the law and not of the facts is equally plain; for it is impossible that he could be ignorant that the plaintiff dwelt and carried on his business in Cambridgeshire, the service of all the processes having been proved to have been made there, and the defendant having originally specially allowed the plaint to be made in his court, within the jurisdiction of which the cause of action accrued, the defendant (the now plaintiff) residing in Cambridgeshire. This case is not, therefore, within the principle of *Lowther v. Earl of Radnor*¹ or *Gwinne v. Poole*,² where the facts of the case, although subsequently found to be false, were such as, if true, would give jurisdiction, and it was held that the question as to jurisdiction or not must depend on the state of facts as they appeared to the magistrate or judge assuming to have jurisdiction. Here the facts of the case, which were before the defendant and could not be unknown to him, shewed that he had not jurisdiction; and his mistaking the law as applied to these facts cannot give him even a *prima facie* jurisdiction or semblance of any. The only questions, therefore, are, whether the defendant is protected from liability at common law, being and acting as the judge of a court of record, in which case the

in *Scott v. Stansfeld*, 37 L. J. Ex. 155, at 158. In *Watson v. Bodell*, 14 M. & W. 57, it was assumed that the want of jurisdiction was known to defendant: see, too, 2 Stark. Ev. (2nd ed.) 426, 811. Where an inferior court assumes a jurisdiction an action of trespass lies against the person executing process; for the whole proceeding is *coram non judice* and a nullity. The party plaintiff in an execution in the inferior court is bound to show in his justification to an action of trespass in respect of such execution, that the cause of action arose within the jurisdiction; the officer of the court is not bound to do this, but only that the court has jurisdiction in *such a matter*. Bac. Abr. Trespass, D. 661. The Case of the Marshalsea, 10 Co. Rep. 76.

¹ 8 East 113, 119.

² 2 Lutw. (C. P.) 1560, 1566.

plea of not guilty would be sufficient ; or whether he is protected by the provisions of any statute." "Although it is clear that the judge of a court of record is not answerable at common law in an action for an erroneous judgment or for the act of any officer of the court wrongfully done, not in pursuance of, though under colour of, a judgment of the court, yet we have found no authority for saying that he is not answerable in an action for an act done by his command and authority when he has no jurisdiction."

In view of a possible ambiguity in what is here laid down, Lord Wensleydale's *dictum* in *Rorke v. Errington*¹ must be borne in mind. "There can be no doubt that a court of limited jurisdiction cannot give itself jurisdiction by finding any facts ;" and thus the aspect presented by the facts to the judge or magistrate at the time of his giving his decision is the subject of evidence when the decision is questioned. Neither can such a court be prohibited on the ground that its decision is erroneous. As Lord Loughborough said, in *Grant v. Gould* :² "The foundation of it" (i.e., an application for a prohibition) "must be that the inferior court is acting without jurisdiction. It cannot be a foundation for a prohibition that, in the exercise of their jurisdiction, the court has acted erroneously."

The same act when done by a judge of a superior court and by a justice of the peace³ may have very different consequences. For example, it is said, in an Irish case of some authority,⁴ "justices of the peace are not, individually, invested with a power to hear and determine any felony or other offence. Their authority is to try before themselves *and others*. No individual justice of the peace has that power," i.e., to issue a warrant to arrest one suspected of a felony, "but, as an individual, he has merely a

Dictum of
Lord Wensley-
dale.

And of Lord
Loughborough

Distinction
between acts
done by a
justice of the
peace and a
judge of a
superior court.

¹ 7 H. L. C. 617, at 632.

² 2 H. Bl. 69, at 101.

³ Justices of the peace are statutory officers first appointed under 1 Edw. 3, c. 16. 2 Co. Inst. 174, 558. At common law there were Conservators of the peace with very limited powers. See Lambard, *Eirenarcha*, cap. 3. In Lord Macclesfield's case, 16 How. St. Tr. 1270, it is said that there are some old statutes that provide that the Chancellor with the Council shall appoint justices of the peace ; but the usage is that the naming of justices of peace is in fact in the Chancellor only. Sir Littleton Powys, in a letter to Lord Chancellor Parker, dated 4 Aug. 1719, and printed 15 How. St. Tr. 1414, at 1421, says : "There was grown a sort of general neglect all over England of the appearances of the justices of peace at the assizes ;" "and that their attendance was a respect due to the king and his government upon those solemn occasions." "But if justices of the peace shall remain at home about their private affairs, or to avoid the trouble of a journey to the assizes, it ought to be looked on as a neglect of the duty of their office ; for they are not called only to notify to the people that they are in commission but to answer to their names in person." The history and powers of justices of the peace are exhaustively considered in the opinions of Littleton and Bayley, JJ., and Vaughan, B., in *Harding v. Pollock*, 2 St. Tr. N. S. 342 ; Dalton, *Country Justice* ; Com. Dig. *Justices of Peace*.

⁴ *Taafe v. Downes*, 3 Moo. P. C. C. 36 n, at 55, but *quære* whether this statement ever was correct ; see Dalton, *Country Justice*, 403 ; Vin. Abr. *Justices of Peace* (F.). As to the law now in England, see 11 & 12 Vict. c. 42, s. 1.

ministerial power to bring the party accused before others as well as himself, for the purpose of trial." "The distinction is this: where process is issued, to bring the party accused before the person issuing the warrant and others, for trial, it is a ministerial¹ act—it is ministerial to the other justices, who are necessarily to sit with the justice issuing the warrant." This is not so in the case of the judge of a superior court; "for he has power and authority to sit alone and try the fact, respecting which the process issued." The act is therefore judicial, and protected.² There is also this further qualification attached to the privilege of justices of the peace, that the act complained of, though done within their jurisdiction, must have been done honestly and in good faith.³ Yet, though a justice of the peace is not protected for words used maliciously, even when he is acting as a judge, malice is not to be inferred from his words, but must be affirmatively proved.⁴ Justices of the peace are to keep the public peace. Their duty with regard to rioters is "to restrain and pursue, arrest and take them." To enable justices to do this, they have authority to call upon the king's subjects to aid them in cases of riot; and the king's subjects are bound to be assistant to them in that respect when reasonably warned. In the case of riot, when justices have done this, they have done all that is required of them.⁵

Rule as to those acting under the order of a judicial authority.

As to those who act under the order of a judicial authority, the general rule of liability is thus expressed: *Qui jussu judicis aliquod fecerit non videtur dolo malo fecisse, quia parere necesse est.*⁶ An

¹ Burn, Justice, Justice of the Peace, Actions against. 1. When an Action lies. As to what are ministerial acts, see *The Queen v. Machen*, 14 Q. B. 74, at 79; *The Queen v. Godolphin*, 13 L. J. M. C. 57; *The King v. Edwards*, 1 Wm. Bl. 637; *The Queen v. Stainforth*, 11 Q. B. 66; *The King v. Austrey*, 6 M. & S. 319, 321; *The Queen v. Aston*, 19 L. J. M. C. 236. As to protection and power of justices, see 11 & 12 Vict. cc. 42, 43, 44. Lord Kenyon, in *Harper v. Carr*, 7 T. R. 270, at 275, says: "I think the case of allowing a poor rate is the single instance in which the justices act ministerially." The case cited decides that a churchwarden taking a distress for poors' rate is entitled to the protection of 24 Geo. II. c. 44, s. 6, on the ground that granting the warrant on which he acts is a judicial and not a ministerial act of the magistrates. This was not cited in *Fourth City Mutual Building Society v. Churchwardens, &c., of East Ham* (1892), 1 Q. B. 661.

² *Taafe v. Downes*, 3 Moo. P. C. C. 36 n, at 55. This privilege is only for acts done judicially, *Case of Mr. Justice Johnson*, 29 How. St. Tr. 81.

³ *Windham v. Clere*, Cro. Eliz. 130; *Lintford v. Fitzroy*, 13 Q. B. 240. But see *Bassett v. Godschall and others*, 3 Wils. 121, where in an action against justices for refusing to grant a licence, malice was alleged; see, too, 11 and 12 Vict. c. 44, s. 1. In *Tozer v. Child*, 7 E. & B. 377, an action was held not to lie against a churchwarden, under The Metropolis Management Act, 1855, 18 & 19 Vict. c. 120, presiding at the election of vestrymen, for refusing a vote or for refusing to allow as a candidate a person entitled to be a candidate, unless malice be alleged and proved.

⁴ *Allardice v. Robertson*, 4 W. & S. (Sc. App. Cas.) App. 102, 1 Dow. N. S. 495.

⁵ Per Littledale, J., *Pinney's Case*, 4 St. Tr. (N. S.) 11, 519. As to liability of justices for refusing to take an examination under a statute, *Green v. Bucklechurches*, 1 Leon. 323, approved *Ferguson v. Kinnoull*, 4 St. Tr. N. S. 785, at 806.

⁶ *Marshalsea case*, 10 Co. Rep. 68 b, 76, cited from D. 50, 17, 167, § 1. In the Reports there is this comment "(but when he has no jurisdiction *non est judex*)."⁶ See per Lord Mansfield, in *Midhurst v. Waite*, 3 Burr. 1259. A ministerial office may be exer-

analogous distinction exists in this connection as governs in the case of judges of record and of inferior magistrates. When a Court has jurisdiction of a cause and proceeds erroneously, all acting under the authority of the Court will be protected.¹ When the Court has not jurisdiction, actions will lie against all acting under the authority wrongly assumed by it.² Where the authority exercised is special, and out of the course of the common law, and confined to a limited jurisdiction (as in case either of warrants for arrest, commitment, or distress, or of convictions or orders by local magistrates), it is requisite that the instrument so to be enforced and obeyed should shew on inspection all the essentials from which the duties arise.³ If, again, cause for the exercise of jurisdiction is expressed, although it may be imperfectly, the officer is not expected to judge of the sufficiency of the statement; so that, assuming the cause expressed is within the jurisdiction of the magistrate, he is entitled to protection.⁴ Where no cause whatever is expressed, the want of jurisdiction is clear.⁵ The law on this point is most neatly summed up in *Peacock v. Bell*:⁶ "The rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so." "Nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged." But writs issued by a superior court not appearing to be out of the scope of their jurisdiction are valid and of themselves a protection to all officers and others in their aid acting under them; although they be on the face of them irregular, as a *capias* against a peeress;⁷ or void in form, as a *capias ad respondendum* not returnable the next term;⁸ for the officers ought not to examine the judicial act of the Court whose

Distinction
between the
case of acting
within or
without the
jurisdiction.

*Peacock v.
Bell.*

cised by a deputy. The difference between a deputy and an assignee of office is stated in *The Earl of Shrewsbury's case*, 9 Rep. 42. As to where the *maxim delegatus non potest delegare* applies, see per Willes, J., *Burial Board of St. Margaret, Rochester v. Thompson*, L. R. 6 C. P. 445, at 457.

¹ *Munday v. Stubbs*, 10 C. B. 432; *Prentice v. Harrison*, 4 Q. B. 852; *Brown v. Jones*, 15 M. & W. 191; *Gosset v. Howard*, 10 Q. B. 411.

² *Marshalsea case*, 10 Co. Rep. 68 b; *Taylor v. Clemson*, 11 Cl. & Fin. 610.

³ *The Queen v. Inhabitants of Stainforth*, 11 Q. B. 66, at 75; *Gosset v. Howard*, per Parke, B., 10 Q. B. 411, at 453; *Agnew v. Jobson*, 13 Cox C. C. 625. By 24 Geo. II. c. 44, s. 6, an action is not to be brought against any constable acting in obedience to Justices' warrant till demand made of the copy of the warrant and refusal thereof. *Jones v. Vaughan*, 5 East 445, contains an explanation of the sec. As to this Act see 11 & 12 Vict. c. 44, s. 17. For the powers incidental to a colonial legislature, justifying punitive action against a member, *Doyle v. Falconer*, L. R. 1 P. C. 328, approved *Barton v. Taylor*, 11 App. Cas. 197.

⁴ *Brittain v. Kinnsaird*, 1 B. & B. 432, and *Mould v. Williams*, 5 Q. B. 469, are authorities for the proposition that the warrant of magistrates is an adjudication of every material point.

⁵ Per Coleridge, J., *Howard v. Gosset*, 10 Q. B. 359, at 390.

⁶ 1 Saund. Rep. 74, cited by Parke, B., *Gosset v. Howard*, 10 Q. B. 411, at 453; see notes 1 Wms. Saund. *in loco*; *The Brewers' case*, 1 Rolle Rep. 134.

⁷ *Countess of Rutland's case*, 6 Co. Rep. 54 a.

⁸ *Parsons v. Loyd*, 3 Wils. 341.

servants they are, nor exercise their judgment touching the validity of the process in point of law, but are bound to execute it, and are therefore protected by it.¹

Where a body of persons have imposed upon them a public duty involving the exercise of a discretion it is undoubted that they are not liable to an action merely for an erroneous exercise of their discretion without malice; even where, as in *Partridge v. General Council of Medical Education and Registration of the United Kingdom*,² they are advised to proceed and do proceed under a wrong section of an Act of Parliament, while by another section of the same Act they have conferred on them the discretionary power involved in their action.

Ministerial officers.

Where there is statutory authority.

With ministerial officers, the general rule is, that a breach of ministerial duties gives a right of action to the party aggrieved thereby.³ To this rule there is a most material modification in the case of acts done under statutory authority by command of the statutory superior, and without negligence in the performance of what is enjoined, although that itself is a negligent injunction.⁴

Where there is no statutory authority.

Where there is no definite statutory immunity the case is somewhat more difficult. The argument that, because in some cases the Legislature has seen fit specially to provide for this difficulty, where it has not done so, there is no protection, is valid only so far as legislation is concerned with the creation of new relations, and not with the declaration and consolidation of old rules of law. There is, however, the authority of Lord Fitzgerald,⁵ while sitting as a judge of the Queen's Bench in Ireland, for the proposition that where acts have been done under orders from a body vested with statutory authority to order; and where the party enjoined is, by statute, bound to compliance with orders thus issued; no liability attaches to the party conforming, even though the orders issued be improvident, and though there be not absolute statutory immunity. On principle this is correct. The ground of accountability is negligence, and negligence is either an omission or commission. By statute, the person acting is bound to carry out the behests of the person enjoining; and by hypothesis, the negligent act is within the scope of the powers of the person enjoining; obedience to the injunction is, therefore, enjoined by statute. The act prescribed is

¹ *Turner v. Felgate*, 1 Lev. 95; *Cotes v. Michill*, 5 Wils. 341, cited *Parke, B., Gosset v. Howard*, 10 Q. B. 411, at 454.

² 25 Q. B. D. 90.

³ Per Brett, J., *Pickering v. James*, L. R. 8 C. P. 489, at 509. The principal cases are cited in the argument in this case. See also *In re Thornbury Election Petition*, 16 Q. B. D. 739.

⁴ *Ante*, 274.

⁵ *Brennan v. Guardians of Limerick Union*, 2 L. R. Ir. 42; considered, *post*, 288.

done, and, by hypothesis, is done without negligence. If in the prescribing of the act there is negligence, that is not the concern of the actor, who, being ordered, is constrained to act, and not to sit in judgment on the act of his superior officer. Thus, when his intervention comes in, there is no negligence. The action (if any) would be against the superior for wrongly prescribing, not against the inferior for performing what it was his duty to do.

The discrimination of a ministerial from a judicial office is considerably complicated by reason of the large number of offices whose duties involve an alternation of judicial and ministerial functions; when it becomes a question of fact what are the duties with regard to the performance of which the action was brought; the decision of each case is thus very mainly concerned with the acts which give it its special colour. The governing consideration is stated by Chancellor Kent:¹ "When the law renders a public officer liable to special damages for neglect of duty, the cases are those in which the services of the officer are not uncompensated or coerced, but voluntary and attended with compensation, and where the duty to be performed is entire, absolute, and perfect."

Determination of what are ministerial and what judicial duties.

We have already seen² what are the criteria of judicial duties.

The distinction, then, between judicial and ministerial duties resolves itself into this—that where one has to exercise a discretion he is protected by judicial privilege; where he has to perform an ascertained duty, he has to do it subject to his liability for negligence if he falls short of efficient performance.

Distinction between them indicated.

This was the rule laid down by Bayley, J., who held that the defendants, who, in the case referred to,³ were the persons repairing a sewer and authorized by statute, were not protected because they acted *bond fide* and to the best of their skill and

Rule as stated by Bayley, J.

¹ *Bartlett v. Crozier*, 17 Johns. (Sup. Ct. N. Y.) 438, at 450.

² *Ante*, 274.

³ *Jones v. Bird*, 5 B. & Ald. 837, at 845; *White v. Peto*, 58 L. T. 710, at 712, where Kay, J., cites with approval the passage in Addison, *Torts* (5th ed.), 671: "If an action be brought against contractors . . . are answerable for damage done"; *Ferguson v. Earl of Kinnoull*, 9 Cl. & F. 251, at 289, 4 St. Tr. (N. S.) 785. In *Sutton v. Clarke*, 1 Marsh. 429; 6 Taunt. 29, road trustees were held free from liability where they did all the statute required them, in the best way they could and according to the best information, though it turned out that they were mistaken. For the American decisions, see *Sherman v. Kortright*, 52 Barb. (N. Y.) 267, and *Weightman v. Washington*, 1 Black (U. S.) 39. In this latter case the corporation was held liable for carrying out a plan that was essentially defective, and which the contractor remonstrated with them for adopting, on the ground that it was unprecedented. In *Stock v. City of Boston*, 149 Mass. 410, it was held that where a city, in constructing a sewer, negligently uncovers a water-pipe, and leaves it exposed, whereby the water in it is allowed to freeze, thus cutting off the supply of one with whom the city is under contract to furnish water so that he cannot by the use of reasonable diligence obtain a supply from that or other sources, and is thereby injured, he may maintain an action of tort against the city for damages; and the freezing of the pipe is the proximate cause of the injury.

judgment. "That is not enough; they are bound to conduct themselves in a skilful manner, and the question was most properly left to the jury to say, whether the defendants had done all that any skilful person could reasonably be required to do in such a case."¹

Government servants not within the rule.

The case of Government servants is not within this rule; for they are the servants of the public, not of the person or persons who have the superintendence of the department in which they work; even if they are appointed by them. The principle may be thus stated—that when a person is acting as a public officer on behalf of the Government, and has the management of some branch of the Government business, he is not responsible for the neglect or misconduct of servants, though appointed by himself in the same business.²

History of the law.

Lane v. Cotton.

The question was mooted so far back as the year 1699,³ when it was resolved by three judges of the King's Bench, against the opinion of Holt, C.J., that the Postmaster-General is not answerable for a packet delivered to the receiver at the Post Office and lost out of the office. The dissent of Holt, C.J., was founded on a comparison of the situation of a postmaster and a carrier or the master of a ship. As was subsequently pointed out by Lord Mansfield,⁴ the comparison does not hold good; since "the Postmaster has no hire, enters into no contract, carries on no merchandise or commerce. But the Post Office is a branch of revenue, and a branch of police created by Act of Parliament." Lane v. Cotton was canvassed and reconsidered in Whitfield v. Lord Le Despencer,⁵ where the question argued was whether the defendant, as Postmaster-General, was personally responsible for the amount of a bank-note stolen in the Post Office by one of the sorters, and while engaged in his work there. This was unanimously decided in the negative. The judgment of Lord Mansfield

Whitfield v. Lord Le Despencer.

Judgment of Lord Mansfield.

¹ Byles, J., indicates a test in *Cooper v. Wandsworth District Board of Works*, 14 C. B. (N. S.) 180, 32 L. J. (C. P.) 185, where he says, at 195: "I conceive they acted judicially, because they had to determine the offence and they had to apportion the punishment as well as the remedy." Overseers in making a rate or in petitioning against a Bill in Parliament, are not ministerial officers, *The Queen v. White*, 14 Q. B. Div. 358.

² Per Lord Wensleydale, *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93, at 124.

³ *Lane v. Cotton*, 1 Ld. Raym. 646, 12 Mod. 472.

⁴ *Whitfield v. Lord Le Despencer*, 2 Cowp. 754, 764.

⁵ (1778) 2 Cowp. 754; *Jones v. Monsell*, Ir. R. 6 C. L. 155. "The law is well settled in England and America that the postmaster-general, the deputy-postmasters and their accountants and clerks appointed and sworn as required by law, are public officers each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him and subject to his orders," per Gray, J., *Keenan v. Southworth*, 110 Mass. 474. *Joslyn v. King*, 20 Am. St. R. 656, is an instance of an action against a mere letter-carrier for negligence in the delivery of a registered letter. 2 Kent, Comm. (12th ed.), 610, Story Bailm. § 463. For the duty to deliver letters gratis, *Rowning v. Goodchild*, 2 Wm. Bl. 906.

establishes the law. He says: "As to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury, is liable in an action for the injury sustained. If the man who receives a penny¹ to carry the letters to the post-offices loses any of them, he is answerable; so is the sorter in the business of his department; so is the Postmaster for any fault of his own. Here no personal neglect is imputed to the defendants, nor is the action brought on that ground; but for a constructive negligence only, by the act of their servants. In order to succeed, therefore, it must be shewn that it is a loss to be supported by the Postmaster, which it certainly is not. As to the argument that has been drawn from the salary which the defendants enjoy; in a matter of revenue and police under the authority of an Act of Parliament the salary annexed to the office is for no other consideration than the trouble of executing it. The case of the Postmaster, therefore, is in no circumstance whatever, similar to that of a common carrier, but he is like all other public officers, such as the Lords Commissioners of the Treasury, the Commissioners of the Customs and Excise, the Auditors of the Exchequer, &c., who were never thought liable for any negligence or misconduct of the inferior officers in their several departments."²

In *Nicholson v. Mouncey*,³ the captain of a sloop of war was held not liable for damage caused by her running down the plaintiffs' vessels when the damage had been done during the watch of the lieutenant, who had the control at the time of the accident. The ground of the claim against the captain was that he was to be considered "in the ordinary character of master of the vessel by means of which the injury was done to the plaintiffs' property." "But," says Lord Ellenborough, C.J., "how was he master? He had no power of appointing the officers or crew on board; he had no power to appoint even himself to the station which he filled on board; he was no volunteer in that particular station merely by having entered originally into the naval service, but was compellable to take it when appointed to it, and had no choice whether or not he would serve with the other persons on board, but was obliged to take such as he found there and make the best of them; he had no power either of appointment or dis-

*Nicholson v.
Mouncey.*

¹ *Edwards v. Dickenson*, 12 Mod. 6. "In all cases deputies are answerable for their own personal misfeasance," *Rowning v. Goodchild*, 2 Wm. Bl. 906.

² *Wright v. Lethbridge*, 63 L. T. 572; see *Robertson v. Sichel*, 127 U. S. (20 Davis) 507, where a collector of customs was sued for the tort of a subordinate in negligently keeping the trunk of an arriving passenger on a pier instead of sending it to a public store, so that it was destroyed by fire.

³ (1812) 15 East 384; *Tobin v. The Queen*, 16 C. B. N. S. 310; *O'Byrne v. Hartington and others*, Ir. R. 11 C. L. 445.

missal over them. The case, therefore, is not at all like that of an owner or master who . . . is answerable for those whom he employs for injuries done by them to others within the scope of their employment."

Statutory powers given to one body with power of carrying them out assigned to another.

Brennan v. Guardians of Limerick Union.

Statement of the law by Fitzgerald, J.

A case, exceptional in its nature, but somewhat analogous in its incidents to the relations existing between the different officers of Government departments, is found where the arrangement and control over matters of public concern is given by statute to one body, while the power of carrying them out is assigned to another; as in the case of the jurisdiction exercised by the Local Government Board over poor law guardians. *Brennan v. Guardians of Limerick Union*,¹ before the Irish Queen's Bench Division deals with this. There an action alleging that a patient in a fever hospital attached to a union workhouse was so insufficiently attended to that he, while in the delirium of the disease, left his bed and fell into a yard attached to the hospital, and was injured. In giving judgment, Fitzgerald, J., referred to various sections of the Irish Poor Law Act which went the length of establishing that, although the guardians of the poor were constituted a corporation to take order for the relief of the destitute poor, they were subordinate to and under the control of and governed by the Poor Law Commissioners; and that the law imposed on these the duty of fixing the staff of paid officers to act under the Guardians, and also gave them the power of removal; that the Commissioners might direct the increase or diminution of the staff, and might fix the duties of the respective officers; and that the guardians could not appoint paid officers unless and until the Commissioners have previously sanctioned the creation of such offices; and though the Guardians might fill up vacancies they were unable to add to the existing staff without the order of the Commissioners. The learned judge, after noting other powers they possessed, said: "Upon a consideration of these provisions of the Poor Law Acts, we have come to the conclusion that the workhouse hospital is portion of the union workhouse in which the Guardians are to take order for the relief of the destitute and sick poor, but subject to the control of the Commissioners; that it is for the Commissioners, and not the Guardians, to determine and direct what staff should be appointed for the workhouse hospital as for any other portion of the union workhouse; and that the duty of the defendants was not 'to provide proper attendants to watch over the plaintiff's son,' but that their duty was to select and appoint such staff of paid attendants as the Commissioners should, by their order and warrant, direct. . . . I desire further

¹ (1878) 2 L. R. Ir. 42.

to state my own impression that on other and wider grounds the action is not maintainable. The administration of the Poor Laws are [*sic*] in the hands of the Poor Law Commissioners, who, by express statutable provisions and their power to make and enforce general and special orders, exercise complete power over every Board of Guardians, and control and direct their action. The Guardians are but a subordinate administrative body, acting as unpaid public trustees in taking order for the relief of the destitute poor. I incline to the opinion that an action does not lie against them in their corporate capacity for a supposed neglect of their administrative duty in not providing adequate relief. For any such neglect of duty they are subject to the order and authority of the Poor Law Commissioners, and may be dissolved as a corporation, and paid officers appointed in their stead to carry into effect the duties they have neglected. The Guardians as a corporation may possibly be liable to indictment, or the individual members of the Board may be personally responsible in damages for negligent omission to perform their individual duties; but it would seem to be against public policy to permit actions to be maintained against them in their corporate capacity for negligent omission in carrying out their administrative duties,¹ and especially as the damages and costs should be paid, if at all, out of the rates. If the present action can be maintained, why should not an action lie against the Guardians, at suit of each pauper, for every supposed neglect of administrative duty, causing to the individual any real or fancied grievance—*e.g.*, for supplying food insufficient in quantity or inferior in quality, or insufficient or inferior clothing or bedding, defective sanitary arrangements, or any other of the various neglects or omissions by which inmates of a workhouse may be prejudicially affected? If the real or supposed omissions of Guardians are to be thus redressed, it would be difficult, if not impracticable, to administer the laws for the relief of the destitute poor."

An unreported English case raised the same point on almost identical facts. Plaintiff's husband, some months previous to the accident out of which the action arose, suffered from delirium tremens, and was received into the infirmary of St. George's-in-the-East, an institution administered under the Poor Laws, as in Brennan's case. The patient was shortly afterwards discharged as cured. Some months afterwards he was brought in again with a certificate from the parish doctor that he was suffering from fits, and was put into the fits ward, a reference being made at the time to his previous admission three months earlier. He showed

Unreported
English case.

¹ See *Mill v. Hawker*, L. R. 9 Ex. 309; L. R. 10 Ex. 92; *Central Railroad, & Co., Company v. Smith*, 52 Am. R. 353.

no symptoms of violence; but after a few days, when the nurse in charge of the ward was in a part of it away from the window, he broke the window, squeezed through the bars, and threw himself into a yard below and was killed. The widow brought her action, alleging as negligence, that the Guardians, having notice of the deceased's previous admission to the infirmary, and the cause of it, had not caused him to be placed in the lunatic ward, or at any rate to be more effectually guarded where he was. The case was tried before Huddleston, B., who gave judgment for the plaintiff; this was reversed in the Court of Appeal, on the ground that the facts disclosed no negligence. The Court thus escaped the necessity of an expression of opinion on the liability of Guardians acting under the Poor Law Orders. Bowen, L.J., notices the subject thus: "I am not sure that it is not, perhaps, humane to the plaintiff that our decision is given against her in the Court of Appeal, because I do not hesitate to say that the other question would be so abstruse as hardly to have stopped at this Court if we decided in her favour."¹

Question
unsettled in
England.
American
decision.

The point may, therefore, be taken to be at present an unsettled one in English law. In America, it seems already authoritatively decided. In *Alamango v. Board of Supervisors of Albany County and the Mayor and Recorder of the City of Albany*² an action was brought by a convict against defendants, who, by Act of the Legislature, "were authorized and directed" to establish a

¹ *Hickmore v. Guardians of St. George's-in-the-East*, which is the case referred to, is not reported in any of the law reports. There are reports of it in its various stages in the *Times* for April 2, April 3, and May 21, 1884. The facts and the quotation in the text are from the shorthand notes kindly supplied me by one of the counsel in the case. In *Curran v. Boston (City of)*, 151 Mass. 505, "pecuniary profit" was received and the maintenance of "the workhouse or house of industry" was "voluntary." Notwithstanding it was held that the city was under no liability. *Maximilian v. Mayor of New York*, 62 N. Y. 160, decided that the city corporation were not liable for the negligence of an employé of the commissioners of public charities and corrections in driving an ambulance waggon belonging to the city. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529, and *Glavin v. Rhode Island General Hospital*, 34 Am. R. 675, consider the liability of a hospital board for the misfeasance of a medical officer. In *Delaney v. Stirling*, 16 Rettie 753, see also 20 Rettie 506, directors of a home—a charitable institution—were held responsible to parents for the custody of children. Town authorities were held liable for removing a child suffering from an infectious disorder to a hospital without the parent's consent and against his remonstrances and without a warrant, in *Mitchell v. Magistrates of Aberdeen*, 20 Rettie 253.

² (1881) 25 Hun. (N. Y.) 551; see also *Brown v. People*, 75 N. Y. 437, 441, and *Perry v. House of Refuge*, 52 Am. Rep. 495, the judgment in which case is not so wide as the terms of the head-note: "An action does not lie against a State house of refuge for an assault on an inmate by an officer thereof." In *Forde v. Skinner*, 4 C. & P. 239, parish officers were held liable for cutting off the hair of a person in a poor-house by force, Bayley, J., saying: "However desirable such a regulation as that of cutting off the hair of persons in a poor-house may be . . . yet it is altogether unauthorized by law, and is a wrongful act if done without the consent of the party." In *Moffitt v. Asheville (City of)*, 14 Am. St. R. 810, where window glass in the window of a police prison was broken and the bedclothes destroyed, but the governing officers of the town were not shewn to have had actual notice of what was done, or to have been negligent in providing adequate supervision, the corporation were held not liable.

penitentiary for the punishment of persons convicted of crime. They acted accordingly, and appointed proper officers to manage and superintend it; these officers illegally put the plaintiff to work; while engaged in which he was injured. The Court held plaintiff could not recover. "The duty of punishing criminals," it was said, "is inherent in the Sovereign power. It may be committed to agencies selected for that purpose, but such agencies while engaged in that duty stand so far in the place of the State, and exercise its political authority, and do not act in any private capacity. It is so in the laying out and maintaining of highways, the building of court-houses and school-houses, as well as in the building of jails and places of detention. In the performance of all such duties it is settled, by the unanimous agreement of the Courts, that these agencies are not liable for neglect or misfeasance, unless the liability is specially imposed by statute."¹

In *Foreman v. Mayor of Canterbury*, Blackburn, J.,² states a cognate point arising under the 37th section of the Public Health Act, 1848,³ which "requires the local board of health to appoint a surveyor and other persons named as officers and servants; at the end of the section it is said that they may dismiss at pleasure all the officers and servants except the surveyor; and the surveyor is not to be dismissed without the approval of the General Board of Health. That being so, it would be a question to consider whether the surveyor whom they are thus required to appoint, and whom they are not allowed to dismiss at pleasure, is in the relation of servant to them in such a way as that, if the matter were being done by the surveyor, and the cause of the mischief were the negligence of the surveyor, the local board of health would be responsible for his negligence. I do not wish to express an opinion as to whether they would or would not be responsible."⁴

Foreman v. Mayor of Canterbury was cited in *Crisp v. Thomas*,⁵ where plaintiff was a scholar in a voluntary school, regulated according to the provisions of the Education Act, 1870,⁶ and the

¹ Cp. *Osborne v. Milman*, 17 Q. B. D. 514; 18 Q. B. Div. 471. A convict in England sentenced to penal servitude cannot sue for any cause of action during the term, 33 & 34 Vict. c. 23, s. 8. The endurance of punishment for felony has the effect of a pardon under the great seal, 9 Geo. IV. c. 32, s. 3. See Com. Dig. Forfeiture, B (3).

² L. R. 6 Q. B. 214, at 218.

³ 11 & 12 Vict. c. 63.

⁴ As to Criminal Liability of the surveyor under 5 & 6 W. IV. c. 50, s. 56, see *Hardcastle v. Bielby* (1892), 1 Q. B. 709.

⁵ 62 L. T. 810; (C. A.) 63 L. T. 756.

⁶ 33 & 34 Vict. c. 75. In Pennsylvania "the school district" is not liable for the negligence of school directors or of their employes," *De Vere Ford v. Kendall Borough School District*, 121 Pa. St. 543. In England there would be no action either against the head teacher or against local managers for the negligence of assistant or pupil teachers. But I know of no case that goes to establish the doctrine of the American

Judgment of
Lord Esher,
M.R.

code. The defendant was the vicar of the parish, and an *ex officio* trustee of the school and the principal member of the committee of management. While in the school, a blackboard fell from an easel and struck plaintiff on the head. The action was to recover damages for the injuries thus inflicted. The negligence alleged was that of one of the teachers, who were appointed by the committee of management, but were not otherwise under its control. Charles, J., held that no evidence of negligence was shewn, although, assuming evidence of negligence, he was of opinion the defendant was liable as a member of the committee of management. The plaintiff appealed on the point of want of evidence of negligence. The Court of Appeal affirmed the decision of Charles, J., as to this; and, on the assumption that there was evidence of negligence, differed from him on the question of liability. The judgment of the Court of Appeal on this point is most forcibly stated by Lord Esher, M.R.: "The defendant is only responsible for his agent and servant, and the schoolmistress was not his servant. He did not pay her wages; she was not bound to obey any order he might give her; he could not appoint her alone, nor of himself could he dismiss her. It is true that he could with the rest of the committee appoint and dismiss her; but even then, supposing they should dismiss her wrongfully, she could appeal to the bishop, and he could reappoint her. Neither the defendant nor the committee have power to direct the schoolmistress what to do or what not to do in the daily management of the school. Therefore she was not in any sense a servant either of the defendant or the committee, still less was the schoolmistress his servant; he could not appoint her as teacher or dismiss or interfere with her in any way at all, and therefore, even if she were negligent, he was not responsible." These considerations, thus forcibly pointed out, are the determining elements in fixing liability.

Suspension of
negligent
public officer.

The King, it may be mentioned, in the exercise of his prerogative, may, by letters patent, suspend a public officer, though his office be granted for life; after suspension the officer is entitled to receive the salary, though not to exercise the functions, of the office.¹

authorities, that "school districts are but agents of the commonwealth, and are made *quasi* corporations for the sole purpose of the administration of the commonwealth's system of public education," and so are under no liability. *Cormack v. School Board of Wick*, 16 Rettie 812, is a Scotch case on the liability of a School Board for defective condition of school premises causing injury to a child attending the school.

¹ Cruise, Dig. tit. 25, s. 113, citing *Slingsby's case* (1680), 3 Swanst. 178. As to acts of officers *de facto*, which are good if done of necessity, but not if not of necessity, *Harris v. Jays*, Cro. Eliz. 699. See also *Nichols v. McLean*, 101 N. Y. 526; *Andrews v. Portland*, 79 Me. 484, 10 Am. St. R. 280.

Where an officer neglects a duty incumbent on him in a public office either by common law or statute, he is indictable for his default.¹ Hawkins² is of opinion he "should rather be immediately displaced than the public be in danger of suffering that damage which cannot but be expected some time or other from his negligence." As to this, it appears a distinction is to be taken between offices concerning the administration of justice or of the commonwealth, to which the officer, *ex officio* or of necessity, ought to attend without any demand or request; in which cases non-user or non-attendance in court is a forfeiture of the office; and those offices in respect of which the officer need not attend or exercise his office, until demand made on him to do so; in the case of any of these, non-user is not a cause of forfeiture, unless there has been a request and subsequent neglect.³ Where the office held is of a private nature to be performed without request, non-user or non-attendance is not a cause of forfeiture, unless it be a cause of prejudice or damage to him whose officer the holder is, in something which concerns his charge.⁴

"If," says Littledale, J.,⁵ "a public officer is guilty of criminal neglect of duty, he is liable to a criminal information," and however honourable and honest his intentions, he is still liable to be found guilty, for the mere intention to do right will not protect him. Blackburn, J., in his charge in *Reg. v. Eyre*,⁶ considers the case of excess beyond official duty thus: "Honesty of intention in such a case is very important; for if it be shewn that the officer, under colour of exercising his office, was really moved by any other motive than an honest desire to do his duty, there is no doubt at all he would be guilty of a misdemeanour; even if there was a perfectly honest intention that would not of itself conclusively determine the question in the officer's favour, although it would be a very important element indeed. I think the officer is bound under such circumstances to bring to the exercise of his duty ordinary firmness, judgment, and discretion. I think he is bound to do that, and I think in such a case the jury have to determine upon the evidence, first, whether the circumstances were in fact such that what was done really was in excess of the

Blackburn,
J.'s, opinion in
Reg. v. Eyre.

¹ *Regina v. Wyat*, 1 Salk. 380. Cp. *The King v. Bembridge*, 22 How. St. Tr. 1, at 150; and *The Queen v. Hall* (1891), 1 Q. B. 747, per Charles, J., at 753, citing *Hawkins*, Bk. 2, c. 25, § 4. All the old English cases are collected, 1 Bishop Crim. Law, §§ 459-464.

² P. C. Bk. 1, c. 66. Of Offences by Officers.

³ *Earl of Shrewsbury's case*, 9 Co. Rep. 46b, 50a.

⁴ *Ibid.* An office shall be lost by forfeiture as if he break the condition annexed to it by law by non-user or abuser. Com. Dig. Officer (K 2) (K 3).

⁵ *Pinney's case*, *The Bristol Riots*, 3 St. Tr. N. S. 11, 506. See *Stewart's case*, 18 How. St. Tr. 863.

⁶ *Finlason's Report*, 58.

duty of the officer, and secondly, whether a person placed in the position of that officer, having the information that he had, believing what he did believe, and knowing what he did know, if exercising ordinary firmness, judgment, and moderation, would have perceived it was an excess. Much allowance should be made for the difficulty of his position, but not too much, and I think it must ultimately in such a case always be a question of more or less, and therefore a question of fact; and so for the jury."

Distinction
between public
officers acting
for the public
at large and
those who act
for individuals.

We have now considered the principles governing the liabilities of those public officers who act for the profit of the public at large. There is, besides, another class, who, in certain of their duties, act not for the public in general, but for such individuals of it who may have occasion to employ them for a certain fee paid. This class includes sheriffs, notaries, and others whom we shall next proceed separately to consider, and who all are liable for the negligence and omissions of their servants in the discharge of such of their duties as we have indicated above.

CHAPTER II.

MINISTERIAL OFFICERS.

I. NOTARIES PUBLIC.

A NOTARY, says Burn,¹ was anciently a scribe, that only took notes or minutes, and made short draughts of writings and other instruments, both public and private. At this day we call him a notary public who confirms and attests the truth of any deeds or writings in order to render the same authentic.² He is the officer of some known Government, and entitled as such to recognition in the commercial world.³ Notaries in England are still appointed by the Court of Faculties, which is "a Court, although it holdeth no plea of controversie."⁴

To practise as a notary in London, and within ten miles, a person must have served for seven years under articles of clerkship, duly authenticated by a qualified notary in actual practice; and if within three miles of London he must also be a member of the Scriveners' Company;⁵ but to practise at a greater distance from London, a person may be admitted upon the production of a certificate of clerkship of five years to a notary or an attorney and notary.⁶

In the *King v. Scriveners' Company*,⁷ Lord Tenterden, C.J., in answer to a suggestion, that the whole business of a notary is the presenting of bills of exchange and drawing up protests,

Duties.
Lord Tenterden, C.J., in *The King v. Scriveners' Company*.

¹ Eccl. Law (9th ed.), Notary Public, referring to Brooke's Treatise on the Office and Practice of a Notary. There is an excellent article on the office and duty of a notary public in 25 Am. Jur. 343. See also Encycl. Brit. Notary. Larousse, Grand Dictionnaire Universel, Notaire.

² In England Notaries were known before the Norman Conquest: Brooke, 3, where "Norman" is misprinted "Roman." Notaries are mentioned in the Statute of Provisors, 27 Edw. III. stat. 1, c. 1, and in the Statute of Præmunire, 16 Rich. II. c. 5. The principal Acts of Parliament regulating the office and duties of notaries are: 41 Geo. III. c. 79; 3 & 4 Will. IV. c. 70; 6 & 7 Vict. c. 90; 7 & 8 Vict. c. 86, s. 4; 33 & 34 Vict. c. 97, ss. 3, 63, 64 (Stamps); 52 & 53 Vict. c. 10, s. 6.

³ *Musson v. Lake*, 4 How. (U.S.) 262, at 275.

⁴ 4 Co. Inst. 337. Byles, Bills (15th ed.), 212.

⁵ As to what is required to constitute apprenticeship, see the *King v. Scriveners' Company*, 10 B. & C. 511, at 519.

⁶ 6 & 7 Vict. c. 90; as to appointment of solicitor outside London, 3 & 4 Will. IV. c. 70.

⁷ 10 B. & C. 511, at 518.

said: "A notary in the City of London has many more duties. Almost all the charter parties are prepared by notaries." "The ship's broker prepares the minutes of the contract; it is afterwards put into form by a notary. There is another part of the duty of notaries, and that is, to receive the affidavits of mariners and masters of ships, and then to draw up their protests, which is a matter which requires care, attention, and diligence. Besides that, many documents pass before notaries under their notarial seal, which gives effect to them, and renders them evidence in foreign courts, though certainly not in our courts of common law.¹ There is a great deal therefore to be done by a notary, perfectly independent of and distinct from this mere matter of presenting bills and drawing up protests."²

Notary not a mere ministerial officer.

A notary is not a mere ministerial officer, in the sense that he is obliged, whether he likes it or not, to execute the duties of his office when called on to do so; he is free to decline to act if so disposed; were this not so, "they might often be innocently the cause of assisting in fraudulent or improper measures, or might be much inconvenienced by applications at improper times and places."³ "Great," says Brooke,⁴ "is the confidence attached to notaries, and very onerous are their duties, and thence the necessity of their being distinguished for extensive knowledge, probity, discretion, and zeal."⁵

Duties.

Notaries should take care to distinguish, in the acts they have opportunity of performing, between those with whose forms they are familiar, and those that require for their performance exceptional skill; "for although it is the business of the parties themselves to take good advice, yet it is prudent for notaries not to undertake a thing that is beyond their capacity, and at least to acquaint the parties of the difficulties which they are not able to understand."⁶

They should preserve carefully and in good order all acts which are deposited with them; and they should grant exemplifications of them, when demanded, to the parties who have a right to demand them.⁷

They must keep secrecy, not only of what passes at the time of the signing of acts, but also as to the acts themselves; and generally they are expected to observe entire fidelity.⁸

¹ *Chesmer v. Noyes*, 4 Camp. 129; but see *Cole v. Sherard*, 11 Ex. 482, per Parke, B., at 483; *In re Goff*, *In re Goff's Estate*, 14 L. T. 727.

² See Anon. case No. 592, 12 Mod. 345.

³ Brooke, *Office of a Notary* (3rd ed.), 17, 18.

⁴ *Office of a Notary* (3rd ed.), 19.

⁵ As to the duty and office of a notary, see *Bellemire v. Bank of United States*, 4 Whart. (Pa.) 105.

⁶ Domat, *Public Law*, 2, 5, 5, § 3.

⁷ *Ibid.* § 4.

⁸ *Ibid.* ss. §§ 5, 6.

Notaries should use a legible seal in order to give effect to certificates of protest or notice; for where the seal is illegible the act purporting to be authenticated may be questioned.¹

In the noting of bills of exchange or promissory notes they must make a "sufficient" demand upon the maker of the note or the acceptor of the bill. If no place of demand other than the city at large be appointed and the party has no residence there, the bill may be protested in the city on the day without inquiry, since that might be interminable and useless.² The general principle is that due diligence must be used to find the party and make the demand. The question in each case is, has due diligence been used with reference to the circumstances of that particular case.³ The presumption, failing other evidence, is that the maker resides where the note is dated, and that he contemplated payment there.⁴ The demand of a foreign bill must be made by a notary public, to whom credit is given because he is a public officer.⁵

Notaries are amenable, either to the jurisdiction of the Court of Faculties, or are liable to an action for negligence.

As to the jurisdiction of the Court of Faculties.

On a complaint made in a summary way to the Master of Faculties, and supported by affidavit or other proof, a notary who has improperly performed the duties of his office will be liable to be struck off the Roll of Faculties—*e.g.*, for permitting his name to be used by an unqualified person, or for practising out of his allotted district, or, probably, for negligence of a grave character.⁶

As to the liability of a notary to action.

A notary, who receives a bill of exchange for the purpose of presenting it, and in case of non-acceptance or non-payment to protest it, or, indeed, to perform any of the duties of a notary, such as those enumerated by Lord Tenterden, C.J., in the extract given above, is bound to use reasonable skill and ordinary diligence in his business, and is consequently liable for injuries to his employer occasioned by want of reasonable skill, and also for ordinary diligence.⁷

Reasonable skill in a notary must be understood to indicate so much only as is ordinarily possessed and employed by persons of

Notaries
accountable
to the Court of
Faculties.

Liability to
action.

Reasonable
skill.

¹ Story, Bills, § 277; 1 Parsons, Notes and Bills, 634, 635.

² *Boot v. Franklin*, 3 Johns. (Sup. Ct. N. Y.) 207.

³ *Firth v. Thrush*, 8 B. & C. 387.

⁴ 3 Kent, Comm. 97.

⁵ Per Buller, J., *Leftley v. Mills*, 4 T. R. 170, at 175. See Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 51.

⁶ 41 Geo. III. c. 79, s. 10; 3 & 4 Will. IV. c. 70, s. 4.

⁷ Story, Agency, § 183.

Ordinary
diligence.

common capacity engaged in the same employment. By ordinary diligence is to be understood that degree of diligence which persons of common prudence are accustomed to use about their own business or affairs.¹

Liabie on the
contract.

A notary is only liable to his employer, or to the person, if any, with relation to whom a duty is constituted by the employment; and is not liable to any one whom his negligence may collaterally injure.²

Notary may
not depute
his duty.

A notary who has undertaken to perform a notarial act cannot depute another to do it, even though that other is himself a notary; for it is a general rule that a personal trust or power, conferred in reliance on the personal qualifications of an individual, is not to be delegated; and an authority is exclusively personal unless from the express language used, or from the fair presumptions growing out of the particular transaction, or the usage in trade, a greater liberty is conceded.³

Negligence to
protest a bill
for non-pay-
ment before
maturity.

It has been held negligence in a notary to protest a bill for non-payment before its maturity, or to delay to demand payment until after its maturity, or to negligently omit to notify the proper parties of the dishonour of a bill whereby the holder loses his remedy against any such parties.⁴

A banker em-
ploying a
notary not
generally
liable for his
negligence.

A question has been mooted, whether a banker employing a notary is responsible for his negligence. This has two aspects. The notary may be employed in some matter for which the appointment of a public officer is not necessary, such as the giving of notices of non-acceptance or non-payment, which may equally well be done by an ordinary clerk. In this case it seems clear that the banker's liability will not be affected by the fact that he has chosen to conduct his business through a notary rather than through an ordinary clerk. But the negligence may be in the performance of a strictly official function, in which the banker is bound to employ a notary. The act of the officer is consequently an independent act, which the banker himself can in no circumstances do, performed by an independent public officer, in virtue of his public position, and not arising out of his agency, and for which he himself is responsible, either to the Court of Faculty or to the person injured by his act.⁵ The duty of the banker, in this case,

If he had used
proper efforts
to select a com-
petent and
trustworthy
one.

appears to be confined to the selection of a competent and trust-

¹ See *post*, Skilled Labour.

² Per Lord Penzance, *Simpson v. Thomson*, 3 App. Cas. 279, 289. Story, *Agency*, (9th ed.), §§ 217 b, 234.

³ *Cockran v. Irlam*, 2 M. & S. 301*n*; *Ess v. Truscott*, 2 M. & W. 385. Broom, *Legal Maxims* (6th ed.), 74; Story, *Agency* (9th ed.), § 14.

⁴ See cases cited, *Shearman and Redfield, Negligence* (4th ed.), § 597.

⁵ *Whitfield v. Lord Le Despencer*, 2 Cowp, 754, at 765.

worthy notary.¹ It is perfectly possible, having reference to the provisions of 3 & 4 Will. IV. c. 70, with respect to the inability of notaries to act out of their districts, that there may be no freedom of choice for the banker ; when his position would appear strongly analogous to that of the employer of a compulsory pilot.² It is thus laid down in a case of the highest authority³ where bills had been transmitted by a banker to a notary. "It is enough here that the notary was not in the matter the agent of the bankers. He was a public officer whose duties were prescribed by law ; and when the notes were placed in his hands in order that such steps should be taken by him as would bind the indorsers if the notes were not paid, he became the agent of the holder of the notes. For any failure on his part to perform his whole duty he alone was liable ; the bankers were no more liable than they would have been for the unskilfulness of a lawyer of reputed ability and learning, to whom they might have handed the notes for collection, in the conduct of a suit brought upon them." The additional fact that the notary is also an employé and agent of the banker does not appear to alter the case. There is a sharp dividing line between his duties as agent and his duties as a public officer ; so that so soon as his public functions come to be discharged his private service becomes suspended and as it were merged.⁴ Although there is a dearth of direct English authority, the law in the United States on the subject appears plain.

In another American case, *Reed v. Darlington*,⁵ it has been held that where a notary has been guilty of negligence and is sued for it, he is placed in the position of the person who but for his negligence would have been charged ; if that person has a defence it is competent to the notary to prove it ; and he must do this with all the particularity and completeness required from that person had the action been against him.⁶

American case,
Reed v. Dar-
lington.

A notary must not protest a draft for non-acceptance before due presentment for payment. If he does the publication may be a libel ; and it has been decided that the notary is liable in an action by the drawee, where he can shew that the protest and its publication were falsely, fraudulently, and maliciously made and calculated to injure him in his credit or business ;⁷ but further

¹ *Bellemire v. Bank of the United States*, 4 Whart. (Pa.) 105.

² *Warren Bank v. Suffolk Bank*, 64 Mass. 582 ; *Agricultural Bank v. Commercial Bank*, 7 Smedes & M. (Miss.) 592.

³ *Britton v. Niccolls*, 104 U.S. (14 Otto.) 757, at 766.

⁴ *May v. Jones*, 30 Am. St. R. 154.

⁵ 19 Iowa, 349.

⁶ In this it is analogous to the rule in actions on covenant of warranty : *Hamilton v. Cutts*, 4 Mass. 349 ; *Greenvault v. Davis*, 4 Hill (N. Y.) 643.

⁷ *May v. Jones*, 30 Am. St. R. 154.

than this, the notary would appear to be liable for the negligence alone, apart from fraud or malice, on the principle governing in *Marzetti v. Williams*.¹

II. THE SHERIFF.

Derivation of
the name.
Office and
authority.

The name sheriff is derived from two Saxon words—*seyre*, that is, a shire; and, *reve*, keeper, bailiff, or guardian. The sheriff has all the authority for the administration and execution of justice which the earl or *comes* had,² unless where statutory enactment has effected an alteration.³ The appointment of sheriff is during her Majesty's pleasure,⁴ so that till the appointment of a new sheriff the office is not determined.⁵ The demise of the Crown does not affect his position; for unless sooner removed or superseded he continues in office till the completion of his term.⁶ In the event of his death his under-sheriff continues in office in the name of the deceased until another sheriff is appointed and sworn, and is answerable in all respects as the deceased sheriff would have been had he lived.⁷

As a judicial officer the sheriff's powers are now practically obsolete,⁸ except for the purpose of executing writs of inquiry as to damages or for some special purpose, as under the Lands Clauses Consolidation Act, 1845.

Sheriff's
Deputy.

The sheriff as a ministerial officer "may make a deputy concerning his office; *scil*, he may make a precept to another to arrest the party, or he may serve a *capias* or other process by his bailiff or servant;"⁹ and, by 50 & 51 Vict. c. 55, s. 23, sub-s. 1, he is bound to make such appointment within one month after notification of his own appointment.

Under-sheriff.

The under-sheriff has not any estate or interest in the office itself, neither may he do anything in his own name, but only in

¹ 1 B. and Ad. 415, Shearman and Redfield, Negligence (4th ed.), § 598.

² Co. Litt. 168; 9 Co. Rep. 49; Dalton, Sheriff, 2. "*Comites*," says Dalton, "*nomen acceperunt a comitando quia principem comitarentur ad bella publicaque negotia ejus lateri semper hærentes*." On this subject generally, see Com. Dig. Viscount; Vin. Abr. Sheriff; Watson, The Office of Sheriff; Kemble, The Saxons in England, vol. ii. chap. 5, The Geréfa.

³ 50 & 51 Vict. c. 55, ss. 8-20. Some ancient statutes as to the appointment of sheriffs are considered in the Earl of Macclesfield's case, 16 How. St. Tr. 767, at 1282.

⁴ 50 & 51 Vict. c. 55, s. 25, sub-s. 2. Proof that a person has acted as sheriff is *prima facie* evidence that he is sheriff without proof of his appointment: *Bunbury v. Mathews*, 1 C. & K. 380.

⁵ Atkinson, Sheriff (6th ed.) 19.

⁶ 50 & 51 Vict. c. 55, s. 3. Originally the office was determined by the demise of the Crown, 1 Bl. Com. 342. By 1 Anne St. 1, c. 2 (c. 8 Ruffhead.), the office was continued for six months after the king's demise.

⁷ 50 & 51 Vict. c. 55, s. 25, sub-s. 1. *Gloucestershire Banking Company v. Edwards*, 20 Q. B. D. 107.

⁸ 50 & 51 Vict. c. 55, ss. 17, 18.

⁹ Dalton, Sheriff, 3. The sheriff, because "he shall answer at his peril," had the appointment, at common law, of all clerks in his county court, keepers of gaols, and subordinate officers whatsoever. *Mitton's case*, 4 Co. Rep. 33b.

the name of the high sheriff, who is answerable for him,¹ so that an action for a false return does not lie against the under-sheriff, for the high sheriff only is chargeable;² and for every default of the under-sheriff the high sheriff shall be amerced, though he shall not be imprisoned for the act of the under-sheriff, nor indicted for any misdemeanour committed by him.³ The reason for the extended liability of the sheriff is, he is supposed, and, in the first instance, bound, to execute his duty in person. The impossibility of so doing authorizes him to delegate his authority to another; and for whatever the delegate does, not only when done *virtute mandati*, but *colore mandati*, the sheriff is responsible.⁴

The under-sheriff is in the nature of a general bailiff, and being in effect only the sheriff's deputy, he is removable. The sheriff may not abridge any part of the under-sheriff's power during the currency of his appointment, though he may determine the appointment.⁵

Incidents and
tenure of his
office.

The high sheriff may take bonds and covenants, from the under-sheriff and from bailiffs and gaolers, indemnifying him from their neglects and defaults in the execution of the offices he trusts to them.⁶

High sheriff
may take bonds
from his
officers.]

It follows from the delegation by the sheriff to the under-sheriff, of the whole of his powers within the limits of the appointment, that the under-sheriff has power to make bailiffs and to issue precepts.⁷

Bailiffs are of three kinds:

Bailiffs.

1. Bound bailiffs.
2. Special bailiffs.
3. Bailiffs of liberties.

1. Bound bailiffs are the ordinary officers of the sheriff, and are bound in an obligation, with sureties, for the faithful discharge of the duties which they are appointed to perform.⁸

1. Bound
bailiffs.

Unlike the under-sheriff, the bailiff is appointed by warrant to act on each occasion of executing process, so that he becomes the special officer of the sheriff for that occasion, and no more.⁹

¹ Dalton, Sheriff, 3.

² Cameron v. Reynolds, 1 Cowp. 403.

³ Laicock's case, Latch, 187.

⁴ Parrot v. Mumford, 2 Esp. N. P. C. 585; Gregory v. Cotterell, 5 E. & B. 571; Smart v. Hutton, 8 A. & E. 568, n; though not for what is done irrespective of the process, unless it is subsequently ratified: Underhill v. Wilson, 6 Bing. 697; nor for what is done after the termination of the bailiff's authority: Brown v. Copley, 7 M. & G. 558; nor yet for what is done by the authority of the execution creditor; Crowder v. Long, 8 B. & C. 598.

⁵ Norton v. Sims, Hob. 12, at 13.

⁶ Dalton, Sheriff, 445; Hob. 12, 13. Mitton's case, 4 Co. Rep. 33 b.

⁷ Parker v. Kett, 1 Salk. 95.

⁸ Watson, Sheriff (2nd ed.), 37; Taylor v. Richardson, 8 T. R. 505. See 1 Bl. Com. 345; and the comment on the passage, 16 How. St. Tr. 50 (n). In the text there is a statement by Sir John Pratt, C.J., of the legal position of bailiffs and the extent of protection the law affords them when executing process.

⁹ Crowder v. Long, 8 B. & C. 598; Drake v. Sykes, 7 T. R. 113; Brown v. Copley, 2 D. & L. 332; Snowball v. Goodricke, 4 B. & Ad. 541.

2. Special bailiffs.

2. Special bailiffs are appointed by the sheriff at the instance of the plaintiff or his solicitor, who, further, must give such personal directions as to constitute them agents of the creditor.¹ Whether the special agency has been constituted is rather a question of fact than of law.² While the special commission exists the sheriff cannot in general be ruled to return the writ,³ and the sheriff is freed from liability to action.⁴ After its determination he becomes liable as in an ordinary case.⁵

3. Bailiffs of liberties.

3. Bailiffs of liberties are officers appointed within franchises by those exercising the same to execute process therein as the bound bailiff does within the county.⁶ The bailiff of the liberty is alone liable, and not the sheriff, in the case of a writ entrusted for execution within his liberty.

Sheriff responsible.

The sheriff is responsible for all acts of the bailiff done in the execution of writs⁷ directed to the sheriff in his ministerial capacity.⁸ His civil responsibility is not confined to the improper manner of executing what is commanded by his warrant, but extends to all acts, however wrongful, provided they are done under cover of the writ,⁹ even though they are against the express instructions of the sheriff,¹⁰ and go the length of fraud.¹¹ The plaintiff, for whose benefit the writ is issued, is not responsible for the misconduct of officers of the sheriff unless he has so intervened in the execution of the writ that the action taken may be regarded as done under his direction.¹² If he has done no more than set the Court in motion, it is the act of the Court, not his, from which the complaint arises.¹³ The same

¹ *Alderson v. Davenport*, 13 M. & W. 42; *Ford v. Leche*, 6 A. & E. 699; *Porter v. Viner*, note to *The King v. The late Sheriff of London in a cause of Rustin against Hatfield*, 1 Chitty (K.B.) 613; *Botten v. Tomlinson*, 16 L. J. C. P. 138. A mere request that a particular officer should be employed is not enough: *Corbet v. Brown*, 6 Dowl. Practice Cases, 794; *Seal v. Hudson*, 4 D. & L. 760.

² *Anderson v. Davenport*, 13 M. & W. 42, at 46; *Wright v. Child*, L. R. 1 Ex. 358.

³ *De Moranda v. Dunkin*, 4 T. R. 119; *Cook v. Palmer*, 6 B. & C. 739, at 742.

⁴ *Pallister v. Pallister*, 1 Chitty (K.B.) 614n.

⁵ *Taylor v. Richardson*, 8 T. R. 505.

⁶ *Dalton, Sheriff*, 459; 50 & 51 Vict. c. 55, s. 34. See *Ritson, The Office of Bailiff of a Liberty*; also 51 & 52 Vict. c. 41, s. 59, sub-s. 2.

⁷ See *Boothman v. Earl of Surrey*, 2 T. R. 5. "For all civil purposes the act of the bailiff is the act of the sheriff," *Ackworth v. Kempe*, 1 Doug. 40, per Lord Mansfield, at 42; *Woodgate v. Knatchbull*, 2 T. R. 148.

⁸ *Saunders v. Baker*, 2 Wm. Bl. 832.

⁹ See *Tunno v. Morris*, 2 C. M. & R. 298, a case where the sheriff was held to have been acting under the direction of the suitors of a county court, and therefore not liable.

¹⁰ *Cook v. Palmer*, 6 B. & C. 739, in which case, however, it was held there was no remedy against the sheriff.

¹¹ *Raphael v. Goodman*, 8 A. & E. 565, cited in *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, 266. As to the responsibility of sheriff for bailiff, see *Lush's Practice* (3rd ed.), 189-190.

¹² *Morris v. Salberg*, 22 Q. B. D. 614; *Wilson v. Tumman*, 6 M. & G. 236; *Brook v. Hook*, L. R. 6 Ex. 89, 96; *Condy v. Blaiberg*, 7 Times L. R. 424 (C. A.); *Walley v. M'Connell*, 13 Q. B. 903; *Bullen and Leake Prec. Plead.* (3rd ed.), 773.

¹³ *Abley v. Dale*, 10 C. B. 62.

holds good with regard to a solicitor, even where he perceives that the officer is going to do wrong and does not set him right.¹

By the common law the sheriff had the custody of the common Gaolers. gaol of the county. He appointed the gaoler, and could remove him at pleasure.² Now, by the Prisons Act, 1865,³ the justices in quarter sessions assembled are constituted the prison authority, and the appointment of gaoler is given to them; and by the Prisons Act, 1877,⁴ it was provided that the sheriff shall not be liable for the escape of a prisoner. Nevertheless, the responsibilities of a gaoler, as far as it is necessary to mention them, may be conveniently noted here.⁵

At common law the gaoler is the sheriff's servant, whom he Gaoler's duty. may discharge at pleasure.⁶ The gaoler's duty is to keep safe custody of all persons committed to his charge as the sheriff's deputy; if he permitted a debtor to escape, the sheriff was liable to an action.⁷ In Stroud's case,⁸ it was held that although a prisoner depart from prison with his keeper's license, yet doing so is an offence as well punishable in the prisoner as in the keeper. A gaoler is not responsible for detaining a man under a warrant irregularly issued, if he detain him only in pursuance of the terms of such warrant; he is responsible if he detain the wrong man, or the right man on a void warrant.⁹

Since a gaoler is as an officer relating to the administration of Position of the justice, if a person threatens him for keeping a prisoner in safe gaoler with custody, he may be indicted, and fined, and imprisoned for it.¹⁰ regard to his prisoners. Again, if a criminal in his endeavour to break the gaol assault his gaoler, he may lawfully kill him in the affray.¹¹ If a prisoner gets out of gaol, and the gaoler in pursuit of him kills him, the gaoler is guilty of an escape, though he never lost sight of him,¹² and is liable in civil process to the party grieved by the

¹ Sowell v. Champion, 6 A. & E. 407, at 417; compare Smith v. Keal, 9 Q. B. D. 340.

² 14 Edw. III. stat. 1, c. 10, repealed as to England by Statute Law Revision Act, 1863, 26 & 27 Vict. c. 125.

³ 28 & 29 Vict. c. 126, ss. 5-10.

⁴ 40 & 41 Vict. c. 21, ss. 30, 31, 32. See now 50 & 51 Vict. c. 55, sec. 16, subsec. 1 & 2. Subsec. 1 states sheriff's liability for an escape.

⁵ As to details, see Bac. Abr. Gaols and Gaolers; Burn, Justice, Gaols. See Emlyn's Preface to State Trials, 1 How. St. Tr. xxxvii., and proceedings against Huggins and others, 17 How. St. Tr. 297.

⁶ Bac. Abr. Sheriff (H.) 5.

⁷ Brown v. Compton, 8 T. R. 424. See Plummer v. Whitchcott, 2 Lev. 158; Com. Dig. Officer (K 3); Roll. Abr. Escape.

⁸ 3 How. St. Tr. 291, where the difference between "breach of prison" and "escape" is stated to be "the first is against the gaoler's will; the other is with his consent, but in both the prisoner is punishable."

⁹ Olliet v. Bessey, Sir T. Jones, 214; Henderson v. Preston, 21 Q. B. D. 362.

¹⁰ Bac. Abr. Gaol. (D).

¹¹ Hawk. P. C. bk. 1, ch. 28, § 13; Jenk. 23, pl. 42.

¹² 2 Hawk. P. C. bk. 2, ch. 19, § 6; Vin. Abr. Escape (Q), Escape of Felons; Ridgeway's Case, 3 Co. Rep. 52.

escape.¹ A head gaoler is answerable for the acts of his deputy, civilly, though not criminally.²

How far
protected.

Moone v. Rose.

It is clear that a gaoler is protected in obeying a warrant valid on the face of it;³ but if in regard to the warrant a statutory duty is imposed, of which knowledge can be imparted to him, and which he does not observe, an action will lie. In *Moone v. Rose*,⁴ the plaintiff had been in custody for contempt of Court in not answering a bill in Chancery. By 11 Geo. IV. & 1 Will. IV. c. 36, s. 15, the duty was cast on the sheriff, gaoler, keeper, &c., in whose charge such a prisoner should be, in default of his being brought to the bar of the Court in the way specified by the statute, to "discharge him out of custody without payment by him of the costs of contempt." In the case now being considered, the gaoler had notice that the commitment was under the statute, and, therefore, as the gaoler did not discharge his prisoner, in performance of this statutory duty cast upon him in express terms, he was held liable in trespass. In *Greaves v. Keene*,⁵ the warrant gave no indication of the particular contempt, and *Moone v. Rose* was distinguished on the ground that the defendant, having acted under the writ, was protected by the exigency of its terms.

Greaves v.
Keene.

Brandling v.
Kent.

In *Brandling v. Kent*⁶ an opinion is expressed by Buller, J., that a gaoler would not be liable for an irregularity in the arrest of a prisoner committed to his charge, and that the sheriff only would be answerable; since it is the duty of the gaoler to receive a person tendered to him by the sheriff, whether the arrest is legal or not. On the other hand, Lord Ellenborough, C.J., ruled at *Nisi Prius*, that a gaoler is liable to an action of trespass and false imprisonment, even though he acted *bonâ fide*, and without the means of ascertaining the identity of the person imprisoned, if, by mistake of the sheriff's officer, the warrant was executed against a wrong person.⁷

Gaoler's duty
to have suffi-
cient force.

The gaoler is bound to have sufficient force to prevent breach of prison, as even breaking the prison by mobs or rebels is no answer to an action for an escape.⁸

¹ Bac. Abr. Gaol, D.

² *Huggins's Case*, 17 How. St. Tr. 297; 2 Ld. Raym. 1574.

³ *Olliet v. Bessey*, Sir T. Jones, 214; *Henderson v. Preston*, 21 Q. B. D. 362; *Tarlton v. Fisher*, 2 Doug. 671, 677; *Ames v. Waterlow*, L. R. 5 C. P. 53.

⁴ L. R. 4 Q. B. 486.

⁵ 4 Ex. D. 73.

⁶ 1 T. R. 60. Buller, J., cites for his opinion *Badkin v. Powell*, 2 Cowp. 476, the marginal note of which is "Trespass *vi et armis* does not lie against a pound-keeper merely for receiving a distress, though the original taking be tortious. *Secus*, if he exceed his duty and assent to the trespass." The *King v. Sharpness*, 2 T. R. 47, is an instance of a prosecution of a gaoler for an escape.

⁷ *Aaron v. Alexander*, 3 Camp. 35; *White v. Taylor*, 4 Esp. (N.P.) 80.

⁸ *Elliott v. Duke of Norfolk*, 4 T. R. 789; *Southcote's Case*, 4 Co. Rep. 83b; *Crompton v. Ward*, 1 Stra. 429; *O'Neil v. Marson*, 5 Burr. 2813. See 2 Kent, Comm. 604 n (b).

"When," says Lord Justice-Clerk Hope,¹ "an officer who has not been able to lodge his prisoner in a gaol separates him from the warrant, which he alone is entitled to hold, he does so at his own peril; and he is bound to make out a very extraordinary case before it can be held that his responsibility has come to an end."

The chief duties entrusted to the sheriff are: I. conducting elections of members of Parliament and coroners; II. summoning juries; III. executing process. Of these in their order.

Ministerial duties.

I. The sheriff's duties and liabilities in conducting the election of members of Parliament.²

I. Duties in the conduct of election of members of Parliament.

"That the officer is only ministerial in this case, and not a judge and not acting in a judicial capacity," say Holt, C.J., and the House of Lords, "is most plain."³ Yet Abbott, C.J.,⁴ says "The returning officer is, to a certain degree, a ministerial one, but he is not so to all intents and purposes; neither is he wholly a judicial officer; his duties are neither entirely ministerial nor wholly judicial; they are of a mixt nature. It cannot be contended that he is to exercise no judgment, no discretion whatever in the admission or rejection of votes;" "the officer could not discharge his duty without great peril and apprehension if, in consequence of a mistake, he became liable to an action."⁵

Under the Ballot Act, 1872,⁶ the returning officer's duties are to provide nomination papers, polling stations, ballot boxes, ballot papers, stamping instruments, copies of register of voters, and to appoint and pay such officers as are necessary for effectually conducting an election in the manner provided by the Act.

Duties of returning officers.

By section 11 every returning officer, presiding officer, and clerk who is guilty of any wilful misfeasance, or any wilful act or omission in contravention of the Act, shall be liable to a fine of £100 in addition to any other liability which he may have incurred at common law.⁷ In connection with this must be

Wilful misfeasance.

¹ *Ross v. M'Bean* (1845) 8 Dunlop 250, at 252.

² The sheriff, in holding the election of coroner, and taking the poll of valid electors and determining which of the candidates is chosen, was exercising functions of a judicial character: *The Queen v. Diplock* L. R. 4 Q. B. 549. See 51 & 52 Vict. c. 41, s. 5, subs. (1).

³ *Ashby v. White*, 14 How. St. Tr. 695, at 789. The passage continues as follows: "His business is only to execute the precept, to assemble the electors to make the election by receiving their votes, computing their numbers, declaring the election, and returning the persons elected; the sheriff or other officer of a borough is put to no difficulty in this case but what is absolutely necessary in all cases. If an execution be against a man's goods, the sheriff must, at his peril, take notice what goods a man has." Com. Dig. Viscount (C4). ⁴ *Cullen v. Morris*, 2 Stark. (N.P.) 577, at 587.

⁵ Per North, C.J., *Barnardiston v. Soame*, 6 How. St. Tr. 1063, at 1098, "the sheriff as to declaring a majority is a judge, and . . . there is the same reason he should be free from actions as any judge in Westminster Hall or any other judge." But see per Lord Ellenborough in *Picton's case*, 30 How. St. Tr. 784, at 787, citing *Schinotti v. Bumsted*, 6 T. R. 646.

⁶ 35 & 36 Vict. c. 33.

⁷ See *Hackney Election Petition*, 2 O'M. & H. 77; *Davies v. Lord Kensington*, L. R. 9 C. P. 720; 2 Will. IV. c. 76; *Barnardiston v. Soame*, 6 How. St. Tr. 1063;

taken the 7 & 8 Will. III. c. 7, by which "all false returns wilfully made" are declared against law and are prohibited.

Ashby v.
White.

In *Ashby v. White*¹ it was ultimately resolved in the House of Lords, reversing the King's Bench, that if a man has a right to vote at an election for members of Parliament, he may maintain an action against the returning officer for refusing to admit his vote, though the person for whom he offered to vote were elected.²

If the sheriff, in the discharge of his duty in the election of members to serve in Parliament, act wilfully and corruptly, he is guilty of a contempt of the House, for which the House may commit him to custody.³

II. The sheriff's duties and liabilities in summoning juries.⁴

II. Duties in
the summoning
of juries.

By 25 & 26 Vict. c. 107, s. 4, the clerks of the peace of every county are required to issue their precepts to the churchwardens⁵ and overseers of their respective parishes, requiring them to prepare jury lists.

By 33 & 34 Vict. c. 77, s. 13, if this work is done negligently, so as to insert "the name of any person whose name ought not to have been inserted therein, or omit therefrom the

Brcom, Const. Law 796, at 800. It is the duty of a returning officer whose account has been taxed under sec. 4 of 38 & 39 Vict. c. 84, to return to each candidate out of his deposit a proportionate amount of any part of the account which has been disallowed, whether such candidate has or has not been a party to the taxation. *Martin v. Tomkinson* (1893), 2 Q. B. 121.

¹ 2 Ld. Raym. 938; 1 Sm. L. C. (9th ed.), 268. Cp. *Drewe v. Coulton*, 1 East 563a.

² *Pryce v. Belcher*, 3 C. B. 58, 4 C. B. 866. But see *Tozer v. Child*, 7 E. & B. 377; *Pickering v. James*, L. R. 8 C. P. 489.

³ *Liskeard Return*, 2 Peck. 324, at 328, 329.

⁴ As to the qualifications, &c., of jurors, 6 Geo. IV. c. 50, 33 & 34 Vict. c. 77, 34 & 35 Vict. c. 2, s. 1; jury lists, 39 & 40 Vict. c. 61, s. 32. The law previously to 1828 is fully given, Tidd, Practice (9th ed.), 775-798. Originally a *venire facias* was directed to the sheriff, commanding him to have twelve good and lawful men from the neighbourhood in Court on a specified day, to try the issue between the parties. When the Court of Common Pleas became stationary at Westminster, this course was inconvenient; the 13 Edw. I. c. 30, was the result, whereby an alteration was made in the *venire*, and instead of the sheriff being simply ordered to bring the jurors to the Courts at Westminster, the sheriff was now required to bring them there on a certain day *Nisi Prius*; that is, unless before that day the justices of assize came into the county. The sheriff, however, was not obliged to return the *venire* until the day he brought the jurors into Court where the justices were sitting; so that the parties were unable to say whether they had just cause of exception to them. This led to the passing of 42 Edw. III. c. 11, which provided that no causes should be tried at *Nisi Prius* till the sheriff had returned the names of the jurors to the Court. Another change then took place in the *venire*. The part relating to *Nisi Prius* was taken out. The sheriff did not in fact summon the jury, and therefore by not appearing on the day they were unavoidably in default; but he returned their names on a panel or alip of parchment, so that the parties had the opportunity of seeking inquiries. In consequence of this seeming neglect of the sheriff, a writ, called a *distringas*, or, in the Common Pleas, *habeas corpora juratorum*, was issued, which commanded him peremptorily to have the bodies of the jurors in Court. This is the process at the present day, 3 Bl. Com. 354. As to challenge of jurors and partiality in striking the jury all the authorities are passed in review in Abbott, C.J.'s judgment, in *The King v. Edmonds*, 1 St. Tr. N. S. 785, at 907. *In re Dutton* (1892), 1 Q. B. 486, decides that the exemptions under 6 Geo. IV. c. 50, s. 52, and 33 & 34 Vict. c. 77, s. 9, extend to service on coroners' juries under 50 & 51 Vict. c. 71. See *ante*, 277, notes 1 and 3.

⁵ The duties of the churchwardens in rural parishes with respect to jury lists are taken away by the Local Government Act, 1894 (56 & 57 Vict. c. 73, s. 5, suba. 2).

name of any person whose name ought not to have been omitted," overseer so guilty "shall, on summary conviction, be liable to a penalty for each offence not exceeding forty shillings."¹

On the principle of *Ashby v. White*,² any qualified juror would have an action against the proper officer for maliciously omitting to insert his name.³

When the jury lists are prepared the clerk of the peace is to forward to the sheriff a book called "The Jurors' Book." This is to remain in use for one year only, beginning on the 1st of January.⁴

Within ten days of the receipt of the book the names of all men qualified therein as special jurors must be taken out by the sheriff and put in a separate list,⁵ and an omission to do this subjects the sheriff to penalties.⁶

By the Common Law Procedure Act, 1852,⁷ the judges of assize may by precept direct the sheriff to summon jurors for the trial of all issues, civil or criminal, within certain limits therein specified. If, however, the name of any person, who is not qualified or liable to serve on juries is inserted in the jury-book, the sheriff is indemnified for returning or impanelling him.⁸ The only remedy would be against the churchwardens⁹ and overseers.

III. The sheriff's duty in the execution of process.¹⁰

III. Duties in the execution of process.

When a writ is delivered to the sheriff he is strictly bound¹¹ to execute it within his county, and there only,¹² according to the exigency of it, without inquiring into the regularity of the proceedings on which the writ is based.¹³ The party should shew that he has a judgment in his favour, or was entitled to an order to arrest under the Debtors Act, 1869.¹⁴ If the sheriff executes the process of a Court not having jurisdiction in the matter in

¹ See *Bray v. Somer*, 2 B. & S. 374. As to misconduct in preparing the lists, *The Queen v. Hall* (1891), 1 Q. B. 747.

² 2 Ld. Raym. 938; 1 Sm. L. C. (9th ed.), 268; *Tozer v. Child*, 7 E. & B. 377.

³ But see *The Queen v. Hall* (1891), 1 Q. B. 747, at 761, 769. In *Wolverhampton Waterworks Company v. Hawkesford*, 28 L. J. P. C. 242, Willes, J., lays down rules with reference to the construction of statutory liability, where there is no liability imposed at common law.

⁴ 6 Geo. IV. c. 50, s. 12.

⁵ 6 Geo. IV. c. 50, s. 46; *Williams v. Thomas*, 4 Ex. 479.

⁶ 33 & 34 Vict. c. 77, s. 15.

⁷ 15 & 16 Vict. c. 76, ss. 105, 106, 107. Amended by 33 & 34 Vict. c. 77. See 6 Geo. IV. c. 50. Probably the sheriff is not liable to an action.

⁸ 6 Geo. IV. c. 50, s. 39.

⁹ See *ante*, 306, note 5.

¹⁰ Bac. Abr. Trespass (D.) 3 (G.) 1; Vin. Abr. Trespass (C. a.), Imprisonment justifiable. By officers upon warrants.

¹¹ Stat. Westm. Sec. (13 Ed. 1), c. 39; *Dalton, Sheriff*, 493; 50 & 51 Vict. c. 55, s. 39: "The sheriff ought to execute the King's writ at his peril, although resistance be made, otherwise he shall be grievously amerced; besides the party shall have his action against him if the writ be not executed;" *Howden v. Standish*, 6 C. B. 504, at 520. *Att.-Gen. v. Kissana*, 32 L. R. Ir. 220. *Shearman and Redfield, Negligence* (4th ed.), §§ 616, 625.

¹² *Sowell v. Champion*, 6 A. & E. 407; *Dalton, Sheriff*, 104, 106.

¹³ *The Marshalsea case*, 10 Co. Rep. 68 b, 76 a, see *Thomas's note*; *Thomas v. Hudson*, 14 M. & W. 353, 16 M. & W. 885.

¹⁴ 32 & 33 Vict. c. 62.

Quotation
from Dalton.

which it professes to act, he will be liable,¹ but not if the Court has jurisdiction, though its order is erroneous.² This is illustrated by Dalton:³ "If the justices of peace arraign a person of treason in their sessions who is convicted and executed, this is felony as well in the justices as in the sheriffs or officers who executed the sentence; but if he had been indicted of a trespass, found guilty and hanged, though this had been felony in the justices, yet it would not be so in the sheriff, because a matter in which the justices had jurisdiction, and which they only were to blame in exceeding their authority."⁴ A writ may therefore be at once good and bad—good as to the sheriff and those acting under him, but bad as to the persons suing it out.⁵

Sheriff may
not set up that
the writ is
erroneously
awarded if it
shows juris-
diction on the
face.

If the writ is, in fact, erroneously awarded, yet shows jurisdiction on the face, the sheriff is not allowed to set up the defect. The authority for this proposition is *Gold v. Strode*,⁶ where, in an action against the sheriff for an escape, it was moved in arrest of judgment that the letters of administration, on which the proceedings were based, were void, and therefore all the dependencies on it were void also. The Court, however, were of opinion that if it were so, the sheriff could not question the judgment of the Court, for it was not a void but an erroneous judgment; "and when a person is in execution upon such a judgment, and escapes, and then an action is brought against the gaoler or sheriff, and judgment and execution thereon, though the first judgment upon which the party was in execution should be afterwards reversed, yet the judgment against the gaoler being upon a collateral thing executed, shall still remain in force."⁷ If the party himself takes out an execution, that will not lie without an award of the Court, such execution will give no authority to hold the defendant, and there will be no escape if he be let go. If the Court have issued execution, though erroneously, it is good till the judgment on which it is founded is set aside.⁸ No one

¹ *Warmoll v. Young*, 5 B. & C. 660; *Imray v. Magnay*, 11 M. & W. 267.

² *Brittain v. Kinnaid*, 1 B. & B. 432; *Thomas v. Hudson*, 14 M. & W. 353, 16 M. & W. 885.

³ Dalton, Sheriff, 107; the translation of Dalton's quotation from the Norman-French is from Watson, Sheriff (2nd ed.), 68, where, however, a wrong reference is given. See Y. B. 14 Hen. VIII. 16, pl. 3.

⁴ The Marshalsea case, 10 Co. Rep. 68 b, at 76 a.

⁵ Parke, B., *Jones v. Williams*, 9 Dowl. Prac. Cas. 702, at 710; 8 M. & W. 349, at 356.

⁶ 3 Mod. 324; *Weaver v. Clifford*, Cro. Jac. 3; *Shirley v. Wright*, 2 Ld. Raym. 775; Bull. N. P. 66: in this work there is a very valuable chapter on the subject, c. vi. 64-74, "Of Case for Misbehaviour in an Office, Trust, or Duty."

⁷ In America it has often been decided that the sheriff cannot refuse to execute voidable process, since it depends on the defendant alone whether it is rendered void: *Bacon v. Cropsey*, 7 N. Y. 195; *Ames v. Webbers*, 8 Wend. (N.Y.) 545.

⁸ Gilbert, Executions, 82. A writ delivered to the sheriff to be executed, when returned is matter of record, and may be proved by an examined copy: *Ramsbottom v. Buckhurst*, 2 M. & S. 565; 2 Wms. Notes to Saund. 216.

can be sued for exercising his legal right to issue execution on a judgment unless he act maliciously and without reasonable and probable cause.¹

In the execution of writs at the suit of the King the sheriff may break open the outer door of a house wherein the defendant or his goods are, but must first signify the cause of his coming, and demand admission.² He may also break the door of a house in executing a *capias utlagatum*, writs of seisin, *habere facias possessionem*, and attachment.³ He may not break open the outer door of any man's house in the execution of process between subjects, for the maxim of law is every man's house is his castle : *Domus sua cuique est tutissimum refugium*.⁴ When once in the house he may break open inner doors in order to take under a *fi. fa.* goods which are within the house.⁵

Sheriff may break open doors at the suit of the King but not of private persons.

The sheriff is only justified in entering the house of a stranger to arrest or seize if he finds the execution debtor or his goods in the house.⁶ If the execution debtor is not in the house, or has no property there, the sheriff is a trespasser,⁷ unless the entry was in hot pursuit of an escaped prisoner; then he must give notice of his intention and purpose,⁸ as in the case of the execution of Crown process.

If the sheriff, in making his entry to arrest, "has been guilty either of a breach of a positive statute, or of an offence against the common law, such violation of the law in making the entry causes the possession thereby obtained to be illegal;"⁹ and if advantage be taken of the unlawful act to cause a person to be arrested, the Court will order his discharge.¹⁰ A distinction was drawn between seizure under a *ca. sa.* and seizure under a *fi. fa.*; for where the sheriff obtained possession of the debtor's person by the illegal act of some one else to which he was not a party, the

Distinction between the law with regard to a seizure of goods and an arrest of the person where an illegality has occurred in some of the circumstances

¹ *De Medina v. Grove*, 10 Q. B. 152; *Huffer v. Allen*, L. R. 2 Ex. 15; *Roret v. Lewis*, 5 D. & L. 371.

² *Semayne's case*, 5 Co. Rep. 91 a; Cro. Eliz. 909; *Burdett v. Abbot*, 14 East 1, at 157, 163; *Launock v. Brown*, 2 B. & Ald. 592, where it is said, "Even in the execution of criminal process, you must demand admittance before you can justify breaking open the outer door," "for if no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be?" Cp. *Ratcliffe v. Burton*, 3 B. & P. 223.

³ *Harvey v. Harvey*, 26 Ch. D. 644.

⁴ *Semayne's case*, 5 Co. Rep. 91 a; 1 Sm. L. C. (9th ed.), 115; Broom, *Legal Maxims* (6th ed.), 404; *American Concentrated Must Co. v. Hendry* (1893), 5 R. 331, per Bowen, L.J., s. c. 62 L. J. Q. B. 388 (C. A.).

⁵ *Hutchison v. Birch*, 4 Taunt. 619; and when the sheriff is lawfully in a house he may break down the outer door to get out: *Pugh v. Griffith*, 7 A. & E. 827.

⁶ *Morrish v. Murrey*, 13 M. & W. 52, at 57.

⁷ *Ratcliffe v. Burton*, 3 B. & P. 223; *Johnson v. Leigh*, 6 Taunt. 246.

⁸ *Anon.*, Lofft 390.

⁹ *Tindal, C.J.*, *Newton v. Harland*, 1 M. & G. 644, at 658. See *Beddall v. Maitland*, 17 Ch. D. 174; *Edwick v. Hawkes*, 18 Ch. D. 199.

¹⁰ *Hodgson v. Towning*, 5 Dowl. Prac. Cas. 410.

law in favour of the liberty of the subject would not in any way let the seizure avail.¹ Where, on the other hand, goods only are involved and are illegally seized, when once they are in the hands of the sheriff, no order will be made for their return.²

The seizure of goods by the sheriff does not vest any property in the creditor under whose writ the seizure is made. The property vested thereby in the sheriff is no more than that which results from his being the officer of the law, and is to enable him to sell the goods and raise the money. The goods are, in fact, in *custodia legis* for the benefit of those who are entitled to them, the property in the meanwhile remaining in the debtor.³

Execution of
a writ in a
liberty.

In the case of the execution of a writ in a liberty the sheriff should in the first instance make out his mandate to the bailiff; when this has been done, the bailiff, and not the sheriff, is answerable.⁴ Process directed to the bailiff is generally void, and the bailiff executing it is guilty of a trespass against the party whose goods are taken in execution; for he is not the officer of the Court, but of the sheriff.⁵

Where there
is a *non omittas*
clause.

Should the writ contain what is commonly called a *non omittas* clause, the privilege of the franchise is thereby swept away, and the sheriff or his officer may enter the liberty and there execute the writ.⁶ In practice it is not unusual to issue a *non omittas* writ in the first instance, without default being made by the bailiff of the liberty.⁷ Where there is no *non omittas* clause, the sheriff is liable to an action at the suit of the owner of the franchise for executing the writ—yet the execution is not invalidated;⁸ so that if the sheriff arrest a man within a franchise, and afterwards let him escape, though he renders himself liable to an action by the owner for an infringement of the franchise, he is also liable to an action for the escape.⁹ The law is similar with regard to an arrest in a royal palace.¹⁰

Sheriff must
find the person
or property
named in the
writ.

The sheriff must, by himself or his officers, adopt the proper measures for finding the person named in the writ, and if he does not he must abide the consequences;¹¹ he must also receive

¹ Hooper v. Lane, 6 H. L. C. 443, at 535; Humphery v. Mitchell, 2 Bing. N. C. 619.

² Hooper v. Lane, 6 H. L. C. 443, at 535; Percival v. Stamp, 9 Ex. 167.

³ Giles v. Grover, 9 Bing. 128, 1 Cl. & F. 72, 6 Bligh N. S. 277. *Ex parte* Rayner, *In re* Johnson, 41 L. J. Bank 26. See 56 & 57 Vict. c. 71, s. 26.

⁴ Boothman v. Earl of Surrey, 2 T. R. 5.

⁵ Grant v. Bagge, 3 East 128.

⁶ Adams v. Osbaldeston, 3 B. & Ad. 489. See 50 & 51 Vict. c. 55, ss. 34, 35.

⁷ Carrett v. Smallpage, 9 East 330.

⁸ Sparks v. Spink, 7 Taunt. 311; Rex v. Mead, 2 Stark. (N. P.) 205.

⁹ Piggott v. Wilkes, 3 B. & Ald. 502.

¹⁰ See Attorney-General v. Dakin, L. R. 4 H. L. 338; Winter v. Miles, 10 East 578, 1 Camp. 475n, for the law of sheriffs' levies in a royal palace, and the distinction between a royal palace and a royal palace which is also a royal residence. Combe v. De la Bere, 22 Ch. D. 316. As to mode of trial for offences in palaces, 33 Hen. VIII. c. 12, which is not repealed.

¹¹ Dean, &c. of Hereford v. Macknamara, 5 D. & R. 95.

all kinds of writs at whatever time and wherever within the country they shall be delivered to him.¹

The 29 Car. II. c. 7, s. 6, prohibits the service of civil process on Sunday,² and 24 & 25 Vict. c. 100, s. 36, made it a misdemeanour to arrest a clergyman on civil process while performing, or travelling to or from the performance of divine service. Statutory provisions.

At common law the sheriff might defer execution till the return day, which was fifteen days after the *teste* of the writ. Now writs are not returnable for any certain time, the limitation being "immediately after the execution thereof."³ Though in strictness the sheriff always ought to have returned every writ when executed, a practice grew up of not doing so, unless he was ruled or ordered to do so by the plaintiff; this was designed to prevent improper conduct in the officer or to found an action against the sheriff, where by the sheriff's negligence the plaintiff's right to recover on his judgment had been defeated.⁴ There is an exception to this practice in the case of an *elegit*, where the *elegit* and inquisition must be returned and filed in order to complete the execution.⁵ Formerly the sheriff might defer execution.

The sheriff must execute the writ on the first opportunity he can get; if he does not he is guilty of negligence, and liable for any damage that may result.⁶ It was contended in *Jacobs v. Humphrey*⁷ that in the case of a *fi. fa.* the reasonable time allowed to the sheriff for executing the writ was not exhausted till a writ of *venditioni exponas*⁸ had been sued out against him; Duty of sheriff now to execute the writ on the first opportunity.

¹ *Brackenbury v. Laurie*, 3 Dowl. Prac. Cas. 180, is cited for this in *Atkinson, Sheriff* (6th ed.), 175, but that case only goes to the neglect of a sheriff in failing to have a "sufficient depnty" under 3 & 4 Will. IV. c. 42, s. 20. The other reference is *Dalton, Sheriff*, c. 20.

² *Eggington's case*, 2 E. & B. 717; *Percival v. Stamp*, 9 Ex. 167.

³ "Formerly the return day was fixed in the writ itself, now it is fixed either by the fact of its being executed, or by an order of a judge, or by lapse of four months:" per Lord Denman, C.J., *Randell v. Wheble*, 10 A. & E. 719, at 729.

⁴ *Daniels v. Gompertz*, 3 Q. B. 322; *Harding v. Holden*, 2 M. & G. 914; *Bradley v. Carr*, 3 M. & G. 221; *Richardson v. Trundle*, 8 C. B. N. S. 474; and Rules of Supreme Court, 1883, Order lii. r. 11. As to time of return where the sheriff has interpleaded, *Angell v. Baddeley*, 3 Ex. D. 49.

⁵ *Underhill v. Devereux*, 2 Wms., Notes to Saund. 197.

⁶ *Brown v. Jarvis*, 1 M. & W. 704; *Tucker v. Bradley*, 15 Conn. 46; *Carlile v. Parkins*, 3 Stark. (N.P.) 163; *Randall v. Wheble*, 10 A. & E. 719; *Mason v. Paynter*, 1 Q. B. 974. By 56 & 57 Vict. c. 71, s. 26, the sheriff must indorse on writs of execution against goods, the hour, day, month, and year when he received them. If he neglects he is liable to an action by s. 57 of the same Act.

⁷ 2 Cr. & M. 413. The same case is an authority for the proposition that declarations made by an officer whilst in possession of goods after the return of the *fi. fa.* are evidence against the sheriff. But in an action against the sheriff, admissions by the under-sheriff are not evidence unless they accompany some official act of the latter or tend to charge himself: *Snowball v. Goodricke*, 4 B. & Ad. 541.

⁸ This is a branch of a *fi. fa.*, and not an independent process. *Hughes v. Rees*, 7 Dowl. Prac. Cas. 56; *Cameron v. Reynolds*, 1 Cowp. 403. Under this it is the sheriff's duty to sell at all events for the best price that can be got: *Keightley v. Birch*, 3 Camp. 520. (Compare, however, *Leader v. Danvers*, 1 B. & P. 359.) This he can do though out of office: *Doe d. Stevens v. Donston*, 1 B. & Ald. 230; but he may take a reasonable time to make inquiries: *Ayshford v. Murray*, 23 L. T. (N.S.) 470. The

but Bayley, B., answered : " The sheriff ought to act without a *venditioni exponas*, and that writ is only to give him alacrity." Yet " extraordinary exertion " is not to be required from him ; all he is bound to shew is " due and reasonable diligence under all the circumstances."¹

It is beyond question that the issue of concurrent writs is not illegal. And it does not signify how long after the first seizure the second is made ; for, until the sheriff has the fact brought to his notice that the writ has been satisfied, he is entitled, and indeed bound, to proceed with the execution.²

On *fi. fa.*, action not maintainable unless actual pecuniary damage is shewn.

In the case of a *fi. fa.*, an action is not maintainable against a sheriff for not levying unless actual pecuniary damage is shewn.³ If damage is shewn, the measure of it, *prima facie*, is the value of the goods which might have been, and were not, levied ; but the jury will have to say whether the whole loss was the result of the sheriff's neglect ;⁴ and the sheriff is not estopped by his return from proving that the goods seized did not belong to the debtor.⁵

Damages obtainable against the sheriff.

The case of *Mason v. Paynter*,⁶ which was an action against the sheriff for not executing a writ of *hab. fac. poss.* in proper time, illustrates what sort of damages can be obtained against the sheriff. The plaintiff went with the writ and warrant, and some persons to assist in putting it in force, and delivered it to the officer, desiring that it might be executed immediately. The officer refused, being told by the defendant's landlord that he should set aside the judgment ; and subsequently it was set aside. The Master, in taxing costs, disallowed the expenses of the plaintiff in trying to have the writ executed, upon the very ground that the writ had not been executed ; but the Court was of opinion that the sheriff was not excused in refusing to execute a writ " when he has the opportunity, is required to do it, and nothing occurs to prevent him ; " and allowed the costs.⁷

sale also must take place in a reasonable time : *Carlile v. Parkins*, 3 Stark. (N. P.) 163 ; and before the return to the *venditioni exponas* : *Bales v. Wingfield*, 2 N. & M. 831a. If through the sheriff's negligence the goods sell for an undervalue, he will be liable to both debtor and creditor : *Mullet v. Challis*, 16 Q. B. 239 ; *Phillips v. Bacon*, 9 East 298. The sale need not be by auction : *Phillips v. Viscount Canterbury*, 11 M. & W. 619 ; but the scale of fees framed under 7 Will. IV. 1 & Vict. c. 55 applied to " sales by auction only." Since the proper mode of compelling a sale by the sheriff is by writ of *venditioni exponas*, the sheriff is not compellable to execute a bill of sale to the plaintiff's nominee, though he has promised to do so : *Cameron v. Reynolds*, 1 Cowp. 403.

¹ *Hodgson v. Lynch*, Ir. R. 5 C. L. 353, per Morris, J., at 356.

² *Lee v. Dangar* (1892), 2 Q. B. 337.

³ *Stimson v. Farnham*, L. R. 7 Q. B. 175.

⁴ *Hobson v. Thelluson*, L. R. 2 Q. B. 642.

⁵ *Stimson v. Farnham*, L. R. 7 Q. B. 175, where the declaration disclosed a state of facts from which the law would presume damage, under the old rules of pleading, the defendant was at liberty to plead that *in fact* no damage was sustained : *Wylie v. Birch*, 4 Q. B. 566.

⁶ 1 Q. B. 974. See also *Hobson v. Thelluson*, L. R. 2 Q. B. 642.

⁷ As to punishment of the sheriff for misconduct, 50 & 51 Vict. c. 55, s. 29. As to the old law, *Vin. Abr. Sheriff* (L.), *et seqq.*

Since the sheriff is responsible for the execution of the writ, he ought, if necessary, to take the power of the county—what number of persons, that is, he shall think good—to aid him effectually to do so. This was provided for by the Statute of Westminster the Second [13 Ed. 1], c. 39: “That the sheriff, as soon as his bailiffs do testifie that they found such resistance, forthwith all things set apart (taking with him the power of the shire), he shall go in proper person to do execution.” This only applied to writs of execution, and therefore, in executing *mesne* process,¹ although the sheriff was permitted, yet he was not compelled to raise the *posse comitatus*;² and ought not, unless resistance was apprehended.³ There does not seem to have been any means of reimbursing the sheriff the expenses he incurred in calling out the *posse comitatus*.⁴ This procedure is practically obsolete; though the law still is that if the sheriff finds any resistance in the execution of a writ he is to take with him the power of the county and go in proper person to do execution.⁵ Modern police protection is at once more efficient and available.

Sheriff responsible for the execution of the writ.

If the sheriff has various writs of *fi. fa.* in his hands against the same debtor, he is bound to execute them all, giving priority to each in the order in which they came into his hands; so that any one who places a writ in the hands of the sheriff is entitled to have it executed as far as possible in his interest and on his behalf. If the sheriff make default, as soon as damage arises, the creditor has a complete right of action against him.⁶ Where the writs to be executed are to arrest the defendant, the rule is, that when the sheriff has once made an arrest valid as regards himself and his own authority, the act operates as an arrest at the suit of all other plaintiffs in all actions in which he holds writs against the party at the time.⁷ When the act he has done

Sheriff's duty where there are various writs in his hands.

¹ By the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 6, no person can be arrested on *mesne process* in any action; but where a plaintiff can shew a good cause of action above £50, and that the defendant is about to quit England, a judge may order the defendant to be arrested till he gives security; or a debtor may be arrested where he is about to abscond, or to remove his goods; or if he fails to attend his examination. See also 45 & 46 Vict. c. 52, 53 & 54 Vict. c. 71, s. 7. As to terms of discharge under the Debtors Act, 1869, see s. 5.

² *Noy Maxim* 42; *Crompton v. Ward*, 1 Stra. 432; *May v. Proby*, Cro. Jac. 419.

³ 2 Co. Inst. 454; *Dalton, Sheriff*, 355, 356.

⁴ *Watson, Sheriff* (2nd ed.), 74; per Parke, B.: “The Master is only to allow what the sheriff is entitled to under the statute 29 Eliz. c. 4, and the fees mentioned in the schedule of fees allowed by the judges under the recent statute”—i.e., 7 Will. IV. & 1 Vict. c. 55; *Slater v. Hames*, 7 M. & W. 413; *Phillips v. Viscount Canterbury*, 11 M. & W. 619. Both enactments are superseded by 50 & 51 Vict. c. 55, ss. 20, 39.

⁵ 50 & 51 Vict. c. 55, s. 8. The sheriff in his sole discretion has the right to require the assistance of the constabulary; *Att.-Gen. v. Kissane*, 32 L. R. Ir. 220; *Miller v. Knox* (H. L.) 4 Bing. N. C. 574.

⁶ *Dennis v. Whetham*, L. R. 9 Q. B. 345.

⁷ *Barratt v. Price*, 9 Bing. 566; *Robinson v. Yewens*, 5 M. & W. 149; *Pearson v. Yewens*, 7 Scott. 435.

is one on which he cannot rely, then it cannot operate as a legal arrest under any other writ which he may hold.¹ In the case of a *fi. fa.* we have already seen that it is otherwise.

The proceeds of an execution must be applied according to the priority of the writs; if there be more than enough to satisfy the first, the surplus must go to the second, and so on.² If the first be invalid by reason of the provisions of the Bankruptcy Law,³ or void on the ground of fraud,⁴ then the second takes its place, and the sheriff holds the goods under the later writ. The practice is the same where the execution of the earlier writ is suspended.⁵ Where the earlier writs and the landlord's rent have exhausted the proceeds, the return is *nulla bona*.⁶

Sheriff bound
to sell.

The sheriff is bound to sell, even on a writ on a fraudulent judgment, for he is not to revise the process of the court, but to execute it.⁷ He is responsible for neglecting to seize and sell under writs in his hands, as against a person lodging a subsequent writ with him, where it is shown that the prior writs were fraudulent, even though he had no knowledge of it. "He fails in his duty by not executing at all; he is, therefore, in the position of a wrongdoer, and if it be shewn that the prior writs would have been ineffectual by reason of being fraudulent as against creditors it does not lie in his mouth to say he did not know it; he has prejudiced the position of the execution creditor by not levying on goods which he might have taken in execution."⁸

Sheriff only to
seize what is
reasonable.

The sheriff must seize only such a quantity of goods as is reasonably sufficient to satisfy the execution; if he sell more he is liable in trover for the excess;⁹ whether he has sold more than is necessary is a question of fact in each particular case. *Prima facie* a sheriff's sale is for ready money and immediate delivery; so that the sheriff is not justified, after he has sold so much as apparently satisfies the writ, in selling more upon a speculation that actual delivery of such goods as he has already sold may be

¹ Hooper v. Lane, 6 H. L. C. 443, per Coleridge, J., at 538.

² Drewe v. Lainson, 11 A. & E. 529.

³ Aldred v. Constable, 6 Q. B. 370; Graham v. Witherby, 7 Q. B. 491; 46 & 47 Vict. c. 52; 53 & 54 Vict. c. 71. *In re Pearce, Ex parte Crossthwaite*, 14 Q. B. D. 966.

⁴ Dennis v. Whetham, L. R. 9 Q. B. 345.

⁵ Hunt v. Hooper, 12 M. & W. 664; Howard v. Canty, 2 D. & L. 115. If the sheriff be directed by plaintiff or his solicitor not to execute the writ, he is bound to obey: *Levi v. Abbott*, 4 Ex. 588. See *Lovegrove v. White*, L. R. 6 C. P. 440; *Smith v. Keal*, 9 Q. B. D. 340. Directions to the bailiff do not necessarily bind the sheriff: *Barker v. St. Quintin*, 1 D. & L. 542; *Walker v. Hunter*, 2 C. B. 324.

⁶ Wintle v. Freeman, 11 A. & E. 539.

⁷ Imray v. Magnay, 11 M. & W. 267, at 275; *Christopherson v. Burton*, 3 Ex. 160.

⁸ Dennis v. Whetham, L. R. 9 Q. B. 345, per Cockburn, C.J., at 348.

⁹ *Stead v. Gascoigne*, 8 Taunt. 527; *Batchelor v. Vyse*, 1 M. & R. 331, rev. 4 Moo. & Sc. 552.

prevented by some loss or accident for which he is not answerable.¹

It is not enough that in the careless discharge of his duty to one the sheriff's negligence may glance off and indirectly and remotely work an injury to another. Before a man can bring an action for negligence he must shew a legal duty to himself. Every man who wrongfully subtracts from the substance of another man's debtor, whereby he becomes disabled to pay, does the creditor an injury; yet is there no right of action; for the law does not look beyond the proximate mischief resulting to a vested right, and redresses this only at the suit of the person immediately injured.²

To warrant:
action against
the sheriff the
injury must
not be merely
consequential.

The sheriff must sell with reasonable expedition,³ and if through his negligent delay the property is lost or depreciated in value, or the debtor becomes bankrupt and his property thereby becomes divested, the sheriff is liable.⁴ In America it has been decided that where a levy is made and property is advertised for sale, and through the negligence of the sheriff no sale takes place, the sheriff becomes a trespasser *ab initio*.⁵ The sheriff is also liable to an execution debtor for negligence in not properly lotting for sale goods seized under a *fi. fa.*⁶

Sale must take
place with
reasonable
expedition.

On offering property for sale under an execution the sheriff ought to state the interest he proposes to sell, and to make known any defect of title within his knowledge; if he does not do so, he is responsible if the title turn out defective.⁷ There is no warranty of title at a sheriff's sale; so that where certain articles had been bought at a sale under an execution for £18, and the bargain was bought for £23, while the articles were afterwards taken under a superior title, it was held that the consideration for the purchase of the bargain had not failed, since

Duty of sheriff
in conducting
sale.

¹ *Aldred v. Constable*, 6 Q. B. 370. The party entitled to execution may levy the poundage fees and expenses of execution over and above the sum recovered, Rules of Supreme Court, 1883, Order xlii. r. 15. The sheriff is entitled where there has been no sale: *Mortimore v. Cragg*, 3 C. P. D. 216; but there must be actual seizure: *Bissicks v. Bath Colliery Company*, 3 Ex. D. 174. See 50 & 51 Vict. c. 55, s. 20. But the execution creditor must be entitled at the time of sale, and the sheriff cannot sell for his own costs: *Sneary v. Abdy*, 1 Ex. D. 299, and is not entitled to poundage before sale, *Roe v. Hammond*, 2 C. P. D. 300. As to the effect of bankruptcy, *In re Craycraft*, 8 Ch. D. 596; *Ex parte Lithgow*, 10 Ch. D. 169; *Howes v. Young*, 1 Ex. D. 146; *Mostyn v. Stock*, 9 Q. B. D. 432. See 53 & 54 Vict. c. 71, ss. 11, 12.

² *Bank of Rome v. Mott*, 17 Wend. (N.Y.) 554.

³ *Jacobs v. Humphrey*, 2 Cr. & M. 413.

⁴ *Aireton v. Davis*, 9 Bing. 740; *Bales v. Wingfield*, 4 Q. B. 580, n.; *Carlile v. Parkins*, 3 Stark. (N.P.) 163.

⁵ *Bond v. Wilder*, 16 Vt. 393; *Jordan v. Gallup*, 16 Conn. 536. See *The Six Carpenters' Case*, 1 Sm. L. C. (9th ed.), 144.

⁶ *Wright v. Child*, L. R. 1 Ex. 358.

⁷ *Commonwealth v. Dickinson*, 5 B. Monr. (Ky.) 506. In Massachusetts it has been decided that if the purchaser at a sale on an execution lose his title through the neglect of the sheriff's officer to comply with the requirements of the law, he has an action against the sheriff: *Sexton v. Nevers*, 37 Mass. 451.

Effect of
sheriff's sale.

the true consideration was the assignment of the right that the defendant had acquired by his purchase at the sheriffs' sale.¹ The effect of a sheriff's sale is to take the property of the debtor and to complete the title of the creditor to the proceeds, unless the creditor has notice of an act of bankruptcy committed previous to seizure,² or the goods are taken for a sum not exceeding £20, including legal incidental expenses.³

Where a sheriff is in possession under several writs, some for more, some for less, than £20, and sells, the writs are payable in order of priority, so long as there are funds to pay. If he receives notice of bankruptcy within fourteen days after the sale, only those writs are entitled to be paid which are for less than £20, and which would have been paid had not bankruptcy intervened.⁴ By the same enactment—the Bankruptcy Act, 1883—where goods to the above-mentioned amount are sold by the sheriff, the sale is to be by auction, unless the Court from which process issues orders otherwise.⁵

Goods in the
possession of
the sheriff.

So long as the sheriff is in possession of the goods of the debtor, he is bound to exercise the same degree of care in their preservation that a man of ordinary discretion and judgment may reasonably be expected to exercise in regard to his own property. He does not insure the goods, but is in the position of an ordinary bailee for the purposes of custody and sale. He is very nearly in the case of a *del credere* agent—the keeper and seller of goods with an obligation to guarantee the sale, and a lien on the proceeds to secure his compensation—and is, consequently, subject to

¹ *Chapman v. Speller*, 14 Q. B. 621. As to the principle of this decision, see per Erle, C.J., *Eichholz v. Bannister*, 17 C. B. N. S. 708. In Benjamin, *Sales* (4th ed.), 634, the rule is thus expressed: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shewn by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold." The whole of the cases are reviewed in the above-cited treatise. See *Baguley v. Hawley*, L. R. 2 C. P. 625, where Willes, J., dissents from the judgment of the Court. The law as stated in the text must be read subject to the interpretation of sec. 12 of 56 & 57 Vict. c. 71, as affected by sec. 21 of the same Act. See *Peto v. Bladea*, 5 Taunt. 657, and note 15 Rev. R. 611.

² *Giles v. Grover*, 9 Bing. 128, 1 Cl. & F. 72, 6 Bligh N.S. 277; in which case the judges were summoned to advise the House of Lords whether, where the sheriff having taken goods on an execution issued at the suit of a subject, but before he had made any disposition of those goods, an extent issued at suit of the Crown, the Crown's extent should be preferred to the execution. The majority of the judges and the House of Lords held the affirmative; see 46 & 47 Vict. c. 52, s. 46. See also 53 & 54 Vict. c. 71, ss. 11, 12.

³ 46 & 47 Vict. c. 52, s. 145. As to goods taken in execution of a less value than £20, see 53 & 54 Vict. c. 71, s. 11, sub-s. 2.

⁴ *In re Pearce, Ex parte Crossthwaite*, 14 Q. B. D. 966.

⁵ As to the effect of bankruptcy on a writ of execution, see 46 & 47 Vict. c. 52, ss. 45, 46; 53 & 54 Vict. c. 71, s. 11. *Ex parte Warren*, 15 Q. B. D. 48; *Trustee of Woolford's Estate v. Levy* (1892), 1 Q. B. 772. As to the construction of 50 & 51 Vict. c. 55, s. 29, sub-sec. 2, in this case, see per Fry, L.J., *Lee v. Dangar*, (1892), 2 Q. B. 337, 351; it is only the actual wrongdoer who is liable under the sub-section, *Bagge v. Whitehead* (1892), 2 Q. B. 355.

the same rule of care and liability.¹ That is, he is not liable for an accidental fire, nor yet for loss by theft, robbery, or other accident, without want of ordinary care on his part.² If the sheriff leaves the goods with the debtor on the security of some third person, the sheriff is liable if the goods are lost either through the fraud or negligence of the debtor, or through the fault of the surety.³ The fact that the bailee of goods holds them as a public officer has never been considered to fix more rigorous measures of liability upon him than if he held them as a private person.⁴ Story puts the liability of an officer on the same footing as that of a bailee for hire.⁵ The same liability was assumed as attaching to sheriffs holding goods taken by attachment, in the American case of *Jenner v. Joliffe*.⁶ It follows that the liability to which the surety may bind himself to the sheriff has nothing to do with the right of the creditor; while it has been held that the sheriff cannot take a receipt or make any contract in relation to the property seized which will give him a remedy beyond his own liability to the creditor.⁷

The law with regard to the execution of an *elegit* is identical *Elegit.* with that we have already considered, and the sheriff's duty is the same. He may not, however, take securities for money under an *elegit*, they being subject to a *fi. fa.* only by the provisions of 1 & 2 Vict. c. 110, s. 12, which does not extend to an *elegit*; and he must not sell under an *elegit*.⁸ Now by the Bankruptcy Act, 1883,⁹ the writ of *elegit* does not extend to goods; and no *levari facias* may issue in civil proceedings.

In the case of a *ca. sa.*¹⁰ the person suing out the process was at Writ of *ca. sa.* liberty at any time to direct the discharge of the person arrested; and a subsequent detention under the same writ gave the person detained a right of action against the sheriff; failing a direction from the person suing out process, the sheriff was bound to keep

¹ *Browning v. Hanford*, 5 Hill (N.Y.), 588, at 591; *Moore v. Westervelt*, 27 N. Y. 234.

² *Bridges v. Perry*, 14 Vt. 262. Story, Bailm., §§ 124-135.

³ *Higgins v. Kendrick*, 14 Me. 83. Shearman and Redfield, Negligence (4th ed.), § 621.

⁴ See as to receivers, *Knight v. Lord Plimouth*, 3 Atk. 480; as to a county treasurer, *Supervisors of Albany v. Dow*, 25 Wend. (N.Y.) 440; as to revenue officers, *Burke v. Trevitt*, 1 Mason (U. S. Circ. Ct.), 96.

⁵ Bailm., §§ 130, 620.

⁶ 6 Johns. (Sup. Ct. N.Y.) 8.

⁷ *Browning v. Hanford*, 5 Hill (N.Y.) 588.

⁸ Co. Litt. 289 b. But see 27 & 28 Vict. c. 112, ss. 4-6, R. S. C. 1883, Order xliii. r. 1.

⁹ 46 & 47 Vict. c. 52, ss. 146, 169.

¹⁰ Since 32 & 33 Vict. c. 62, this writ has been of infrequent use, as arrest and imprisonment for debt has been abolished thereby, with but a few exceptions, which are principally where the defendant could, but would not, pay. There is power to arrest also by the Bankruptcy Acts, 1883 (46 & 47 Vict. c. 52), ss. 25, 163, 167, and 1890 (53 & 54 Vict. c. 71), s. 3, sub.-s. 8.

his prisoner in custody till the Court granted an order for discharge.¹

The sheriff need not have released his prisoner on the arrival of the order of discharge; indeed he might be responsible to some other creditor, who in the meantime had placed a writ with him, if he did; he was entitled to a reasonable time to search his office to ascertain whether other writs are lodged against his prisoner. Thus, where a sheriff received an order on a Saturday for the discharge of a prisoner, and on the next day a warrant was received for his detainer under a *ca. sa.* which had issued the day before, the Court held that the sheriff had done rightly in not at once liberating him, and was bound to detain him under the new writ.² And where a prisoner, who came into custody lawfully, was detained beyond his time, it was held that the sheriff by detaining him did not become a trespasser *ab initio*.³ To charge a sheriff for not arresting a defendant on a writ, it must have appeared that the sheriff had notice of the party's being in his bailiwick between the delivery and the return of the writ. It was not the creditor's duty to find out the defendant in the writ, especially when he could be found by the officer if he used ordinary diligence.⁴ An arrest of the debtor after the return day would not excuse the sheriff's neglect; in such a case the creditor was entitled to at least nominal damages.⁵

If the officer of the sheriff, under a writ of *ca. sa.*, received the money and liberated the debtor, the sheriff was liable for an escape; since it was a neglect of duty on the part of the officer, who "is directed to have the body of the debtor at the return to satisfy the plaintiff, and not to pay the debt." But under a writ of *fi. fa.* the sheriff may receive the money and liberate the goods, since he "is directed to make a sum out of the goods and chattels of the defendant, and *himself* to have that money at the return."⁶

In the case of privilege, though the sheriff is justified in detaining the person in custody—that is, though no action for false imprisonment can be maintained against him for so doing⁷—

¹ *Re Thompson*, 22 W. R. 857, see the Debtors Act, 1869, 32 & 33 Vict. c. 62; *Jackson v. Mawby*, 1 Ch. D. 86, referred to *Weldon v. Weldon*, 10 P. D. 72. Where one is arrested in one action he is constructively in the custody of the sheriff in all actions in which writs have been delivered to the sheriff; but if the arrest is illegal, he cannot be detained without a fresh arrest: *Collins v. Yewens*, 10 A. & E. 570.

² *Samuel v. Buller*, 1 Ex. 439.

³ *Smith v. Egginton*, 7 A. & E. 167. See *Magnay v. Burt*, 5 Q. B. 381, and Willes, J.'s, explanation of the decision, *Ames v. Waterlow*, L. R. 5 C. B. 53, at 63; *Ash v. Dawnay*, 8 Ex. 237.

⁴ *Beckford v. Montague*, 2 Esp. (N.P.) 475. Cp. *Gibbon v. Coggon*, 2 Camp. 188.

⁵ *Barker v. Green*, 2 Bing. 317.

⁶ *Woods v. Finnis*, 7 Ex. 363.

⁷ *Countess of Rutland's case*, 6 Co. Rep. 52 b; *Duke of Newcastle v. Morris*, L. R. 4 H. L. 661; *Tarlton v. Fisher*, 2 Doug., 672; *Crossley v. Shaw*, 2 Wm. Bl. 1085; *Magnay v. Burt*, 5 Q. B. 381; *Gilpin v. Cohen*, L. R. 4 Ex. 131; *Watson v. Carroll*,

still he is not bound to do so. Yet if, on a bailable writ in the case of a peer or a member of the House of Commons, the sheriff were to make an arrest, he would be liable to be committed for breach of privilege.¹

The responsible officer of the sheriff was bound to execute the writ; so that an arrest by a bailiff not charged with the execution of the writ was held bad, and the defendant entitled to his discharge; and where one was shot while trying to arrest on a warrant in which his name had been wrongfully inserted, it was held not murder.²

The writ of *capias utlagatum* was executed in the same manner as a *ca. sa.*; with this additional power to the sheriff—that he might break open the house of the person outlawed.³ Writ of *capias utlagatum*.

In executing writs of possession (*habere facias possessionem*) the sheriff is bound to execute the writ within a reasonable time; and if after a writ is delivered to him, and he has an opportunity to execute it, and refuses or neglects to do so, he is liable to an action, even though the judgment is afterwards set aside by a judge's order in order to let in the landlord to defend.⁴ The sheriff usually has an indemnity given him, and it seems he may demand it.⁵ The plaintiff is bound to point out the land to the sheriff.⁶ “Also,” says Dalton,⁷ “the sheriff is bound to know or to seek the land demanded; and therefore, except the demandant sheweth it to him, he may make his return accordingly.” “If the plaintiff shows the sheriff a stranger's land, on which the sheriff accordingly enters, it seems no action lies.”⁸ The sheriff is further bound to give actual possession of the premises, so that if persons be left on them the execution is not complete,⁹ for he is

Writ of possession.

⁴ M. & W. 592; Phillips v. Naylor, 3 H. & N. 14, 4 H. & N. 565; *In re Anglo-French Co-operative Society*, 14 Ch. D. 533; see 46 & 47 Vict. c. 52, s. 124. By 7 Anne, c. 12, s. 4, if the sheriff arrests an ambassador or his servant on civil process, he is liable to fine and imprisonment.

¹ Bac. Abr. Privilege (C) 6; Stockdale v. Hansard, 11 A. & E. 253; Bradlaugh v. Gossett, 12 Q. B. D. 271. Cp. Chauvin v. Alexander, 2 B. & S. 47; Yearsley v. Heane, 14 M. & W. 322, at 334; *In re Freston*, 11 Q. B. D. 545. When a person arrested under a *ca. sa.* is discharged on the ground of privilege, the writ is not executed, and he may be retaken under it when his privilege expires: Barrack v. Newton, 1 Q. B. 525. As to pleading in an action against the sheriff for damage caused to plaintiff from carelessness, and improperly arresting while privilege attached, see Lloyd v. Wood, 5 A. & E. 228.

² Rhodes v. Hull, 26 L. J. Ex. 265; Gregory v. Cotterell, 5 E. & B. 571. Per Kenyon, C.J., Housin v. Barrow, 6 T. R. 122.

³ Dalton, Sheriff, 524. In England outlawry on civil process was abolished by 42 & 43 Vict. c. 59, s. 3.

⁴ Mason v. Paynter, 1 Q. B. 974.

⁵ Watson, Sheriff (2nd ed.), 318.

⁶ Doe d. Davenport v. Rhodes, 11 M. & W. 600, at 608; Roe d. Blair v. Street, 2 A. & E. 329.

⁷ Sheriff, 257.

⁸ Dalton, Sheriff, 257. Watson has a note to this, “*Sed vide* Keil, 119, 120,” but I have not been able to trace the case referred to.

⁹ Upton v. Wells, 1 Leon. 145; Watson, Sheriff (2nd ed.), 318.

required to put the plaintiff into possession. It follows, from the nature of the writ, that the sheriff may break open either outer or inner doors.¹ The sheriff executes the writ at his peril,² and if he gives possession of land not included in the writ, he renders himself liable to an action.³

Formerly the Court would grant an *alias* if the sheriff did not execute the writ;⁴ and if the sheriff gave possession only of part, the plaintiff might have a new writ for the rest.⁵ But the form of granting an *alias* was abolished by the Common Law Procedure Act, 1852, s. 10, and the present practice is regulated by the Rules of the Supreme Court, 1883.⁶

It is not essential to the validity of an execution for the sheriff to make a return to the writ. If he do make a return, he may excuse himself on the ground that he was always ready to deliver possession to the plaintiff, and that no person on behalf of the plaintiff came to shew the premises to the sheriff.⁷ It is not a good return that the sheriff could not execute the writ; for he should have raised the *posse comitatus*.⁸

Interpleader.

Interpleader.⁹—The granting of an interpleader order is purely discretionary.¹⁰ It is the duty of the sheriff to make inquiry, and to have good ground for supposing the goods seized to be those of the execution debtor before he applies for relief.¹¹ The goods or money in dispute must be actually in his hands at the time of application to the Court in order to entitle him to it.¹²

The Court will protect the sheriff only from the original seizure, and not against subsequent misconduct,¹³ or he may be relieved in respect of conflicting claims while his liability for negligence in

¹ Semayne's case, 5 Co. Rep. 91 b, 1 Sm. L. C. (9th ed.), 115.

² Dalton, Sheriff, 256.

³ Ackworth v. Kempe, 1 Doug. 40; Watson, Sheriff (2nd ed.), 318.

⁴ Watson, Sheriff (2nd ed.), 320. An *alias* was a second writ issued after a former one had proved ineffectual. If the *alias* also failed, a third writ might have been sued out, which was called a *pluries*. These writs were so called from the words used in them, *Sicut alias præcipimus. Sicut pluries præcipimus*. An *alias* cannot issue after the writ is executed: Doe dem. Pate v. Roe, 1 Taunt. 55. The whole learning on executions in civil actions can be found in Tidd, Practice (9th ed.), 993–1134. This must of course be checked with some modern practice book.

⁵ *Ibid.*

⁶ Order xlii. r. 17. See Lee v. Dangar (1893), 2 Q. B. 337; *Ex parte Kent, In re Wells* (1893), 5 R. 226.

⁷ Watson, Sheriff (2nd ed.), 322.

⁸ *Ibid.* See Miller v. Knox (H. L.), 4 Bing. N. C. 574; Att.-Gen. v. Kissane, 32 L. R. Ir. 220.

⁹ By the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), the statutes relating to Interpleader are repealed, and the law is now regulated by Order lvii. of the Rules of the Supreme Court, 1883. The history and growth of interpleader is traced in Story, Eq. Jur. §§ 800–824, and the authorities there cited.

¹⁰ Wright v. Freeman, 48 L. J. C. P. 276.

¹¹ Bishop v. Hinxman, 2 Dowl. Prac. Cas. 166.

¹² Holton v. Guntrip, 3 M. & W. 145.

¹³ Lewis v. Jones, 2 M. & W. 203.

respect of the execution of the writ is unaffected;¹ and it is immaterial whether an action is commenced or not so far as the protection afforded goes.²

The remedies against a sheriff are of two kinds: first, by attachment; second by action.

Remedies
against the
sheriff.

First, by attachment.

I. Attachment.

Attachment is a criminal process directed to the coroner when it issues against the sheriff, or to the acting sheriff when it issues against his predecessor.³

By the rules of the Supreme Court, 1883, Order lii. r. 11, "No order shall issue for the return of any writ, or to bring in the body of a person ordered to be attached or committed; but a notice from the person issuing the writ or obtaining the order for attachment or committal (if not represented by a solicitor), or by his solicitor, calling upon the sheriff to return such writ or to bring in the body within a given time, if not complied with, shall entitle such person to apply for an order for the committal of such sheriff."⁴

Provision
under Rules of
the Supreme
Court.

Attachment may be granted for escapes,⁵ extortions,⁶ using needless force in making arrests,⁷ breaking open doors without valid excuse,⁸ wrongfully arresting, ill-treating arrested persons, detaining them in custody unlawfully,⁹ or making an insufficient return to a writ,¹⁰ and for omitting to return writs, or to bring up the body of a prisoner in obedience to a writ of habeas corpus;¹¹ and generally for all misconduct by the sheriff which falls within sec. 29 of the Sheriffs Act, 1887.¹²

For what
granted.

A sheriff is not liable to attachment for not returning a writ which has not been transferred to him by his predecessor, the provisions of 3 & 4 Will. IV. c. 99, s. 7 notwithstanding;¹³ nor where there is a disputed state of facts;¹⁴ nor where his action is

For what not
granted.

¹ *Brackenbury v. Laurie*, 3 Dowl. Prac. Cas. 180.

² *Green v. Brown*, 3 Dowl. Prac. Cas. 337.

³ *Tidd, Practice* (9th ed.), 479, 481, Com. Dig. Attachment.

⁴ "Committal was the proper remedy for doing an act prohibited by injunction or the like, whereas attachment was the remedy for neglecting to do some act ordered to be done:" *Harvey v. Harvey*, 26 Ch. D. 644, at 654; *Callow v. Young*, 56 L. T. 147.

⁵ *Arden v. Goodacre*, 11 C. B. 367, 371; *Regina v. Sheriff of Leicestershire*,

1 L. M. & P. 414. As to Escapes, Com. Dig. Escape; Vin. Abr. Escape.

⁶ Com. Dig. Extortion; Bac. Abr. Extortion.

⁷ Com. Dig. Execution (C. 12).

⁸ *Watson, Sheriff* (2nd ed.), 75; Com. Dig. Forceable Entry; Hawk. P. C. bk. 2, c. 14, Where doors may be broken open in order to make an arrest.

⁹ Hawk. P. C. bk. 2, c. 13, Of Arrests by Publick Officers; bk. 2, c. 22, Of Attachment, ss. 2, 3.

¹⁰ *Hall v. Crawley*, 11 W. R. 344.

¹¹ *Short & Mellor, Cr. Prac.* 407.

¹² 50 & 51 Vict. c. 55, s. 29, sub-s. 4.

¹³ *Thomas v. Newnam*, 2 Dowl. N. S. 33. The Act quoted in the text is repealed by 50 & 51 Vict. c. 55, s. 39, but is preserved in substance by ss. 28, 29, sub-s. 2.

¹⁴ *White v. Chapple*, 4 C. B. 628, where the officer of the Palace Court seized goods under the process of that Court that had been previously seized by the sheriff, during the temporary absence of his officer, it was held that, as there was no ground for charging the officer of the Palace Court with intentional contempt of court, there was no ground for attachment. The Court will not issue an attachment unless the sheriff's conduct amounts to a contempt of court: *Collins v. Cliff*, 11 W. R. 786.

due to some arrangement not made in the course of his duty as officer of the Court.¹

Must be taken
in a reasonable
time.

Proceedings for attachment against the sheriff must be taken within a reasonable time, else by delay the sheriff may be deprived of his remedy over;² and an attachment has been set aside, because, through delay in issuing it, the sheriff has been prevented either recovering on a judgment or proving for it in bankruptcy.³

Setting aside
attachment.

Where an attachment is regular it may be stayed or set aside by the indulgence of the Court, in order to permit of a trial on the merits, or for the benefit of the sheriff, or of the defendant or his bail.⁴ If the sheriff had been guilty of a breach of duty in discharging the defendant out of custody without the plaintiff's assent, and without taking a bail bond, the courts will not set aside a regular attachment.⁵ Where the Court will not set the attachment aside, the sheriff is liable to the extent of the sum really due from the defendant to the plaintiff, although it be beyond the sum sworn to, and for costs in addition.⁶

Attachment
permitted to
stand over.

The courts have made a practice of letting the attachment stand over, with liberty to the plaintiff to bring an action against the sheriff, when, from any cause, proof of the injury done the suitor, by the neglect of the sheriff, is not shewn with sufficient particularity. One reason for this is, that proceedings on attachment being by affidavit, "a mode of adducing evidence which affords no means of extracting the truth from unwilling witnesses, and leaves every one at liberty to state as much or as little of the truth as he pleases," it is frequently necessary that a *vivâ voce* examination of witnesses should be had; while, under the old practice, either party had thus an opportunity to tender a bill of exceptions if thought desirable.⁷ Under the present

¹ *Brown v. Gerard*, 1 C. M. & R. 595.

² *Rex v. Perring*, 3 B. & P. 151; *The King v. Middlesex*, 1 Dowl. Prac. Cas. 53. *Contra*, see *The King v. Sheriff of London*, 1 Taunt. 489, where the delay was ten days and the sheriff did not shew he was prejudiced by the delay; in *The King v. Sheriff of Surrey*, 9 East 467, where the delay was eighty days, and a bankruptcy intervened, the attachment was set aside. Now see 50 & 51 Vict. c. 55, s. 29, sub-s. 7.

³ *Corner*, Crown Practice, 36. As to setting aside an attachment, *Arden v. Goodacre*, 11 C. B. 367.

⁴ *Stride v. Hill*, 1 M. & W. 37.

⁵ *Watson*, Sheriff (2nd ed.), 177; *Vanderhaden v. Britten*, 4 D. & R. 155; *The King v. Sheriff of Surrey*, 7 T. R. 239; *The King v. Sheriffs of London*, 2 B. & Ald. 354.

⁶ *Heppel v. King*, 7 T. R. 370; *Stevenson v. Cameron*, 8 T. R. 29; *Fowlds v. Mackintosh*, 1 H. Bl. 233; but see *The King v. Sheriffs of London*, 2 B. & Ald. 192, where it is said the contempt of the sheriff is purged by placing the plaintiff in as good a situation as he could have been in had the defendant's body been brought into court. As to the present practice in attachment, see *Dan. Ch. Pr.* (6th ed.), 875-891; *Seton* (5th ed.), 381-388; *Chitt. Arch.* (14th ed.), 941-954; *Dan. Ch. Forms* (4th ed.), 395. As to the history of the law, *Hawkins*, P. C. bk. 2, c. 22.

⁷ *Arden v. Goodacre*, 11 C. B. 367; *Regina v. Sheriff of Leicestershire*, 1 L. M. & P. 414.

practice, cross-examination on affidavits may be directed either on the civil or the Crown side of the Court.¹

Second, by action.

II. Action.

An action lies only against the high sheriff, and not against the under-sheriff or bailiff, for breach of duty in the office of sheriff, and must be brought as for an act done by him in the office of sheriff. If the breach proceeds from the default of the under-sheriff or bailiff, that is a matter to be settled between them and the high sheriff.²

An action for negligence is maintainable against the sheriff, not because the plaintiff has sued out a writ and delivered it to the sheriff who has not executed it and thereby has broken an implied contract; but because the plaintiff has a cause of action or judgment against the defendant which gives him an interest in the writ and creates a duty by law apart from contract in the sheriff to him.³

Actions against the sheriff may be either by the person suing out the writ, or at the suit of the person whose person or goods the sheriff has taken.

Actions against the sheriff: either at the suit of the person suing out the writ, or at the suit of the person whose person or goods are taken.

I. The sheriff may be liable at the suit of the person suing out the writ.

I. Action by him who sued out the writ.

If the sheriff make a false return he is liable to an action—that is, if actual damage occurs to the plaintiff.⁴ He is not liable to an *action* for not returning a writ.⁵

False return.

A false return is one in which material facts are suppressed, or material facts are stated which are untrue. A return, although true in words if false in the total impression it conveys, is a false return.⁷ That is not a false return which, while it states the facts truly, draws a wrong inference from them.

As between the parties to it, the sheriff's return is conclusive of its truth, except in an action against the sheriff for a false return; in which case the return must of necessity be called in question by the plaintiff.⁸

Sheriff's return conclusive, save in action for a false return.

It is no defence, to an action for a false return of *nulla bona* on an execution, to shew that the writ to be executed was delivered

Where action may be maintained.

¹ R. S. C. 1883, Order xxxviii. r. 1, extended to civil proceedings on the Crown side by Order lxviii., and to criminal proceedings by Crown Office Rules, 1886, r. 6. Short & Mellor, Crown Practice, 454.

² Per Lord Mansfield, *Cameron v. Reynolds*, 1 Cowp. 403, 406; but see 50 & 51 Vict. c. 55, s. 29, sub-s. 2.

³ *Jones v. Pope*, 1 Wms. Saund. 34, 37, at 38, which is an action for an escape, where the prisoner was let out with the plaintiff's consent.

⁴ *Pitcher v. King*, 9 Ad. & E. 288; Com. Dig. Return (F. 2); Vin. Abr. Return.

⁵ *Wylie v. Birch*, 4 Q. B. 566.

⁶ 2 Co. Inst. 452.

⁷ *The King v. Lyme Regis*, 1 Doug. 149.

⁸ *Slayton v. Chester*, 4 Mass. 478, per Parsons, C.J., at 479.

at a late hour on the day on which it was returnable,¹ nor yet to shew that the execution debtor was insolvent.²

If the sheriff return *feri feci*, the plaintiff may proceed either on the return for debt,³ or for money had and received,⁴ or by rule of Court.⁵

If no return is made, an action will still lie against the sheriff for the sum levied, or against his executors for non-payment of money levied on a *fi. fa.*⁶ An action will also lie, if the sheriff return that he has seized certain goods and chattels of which the value is to him unknown, for he should specify.⁷

The plea that the sheriff is prevented from paying over money by superior force is in no case good.⁸

In an action for neglecting to seize goods under a *fi. fa.* with a return of *nulla bona*, a plea denying that there were any goods of the debtor within the sheriff's bailiwick, may be supported by proof that, though there were goods, they were not applicable to the plaintiff's writ.⁹

Escape.

"Every liberty given to a prisoner not authorized by law, is an escape."¹⁰ The sheriff, then, is liable for an escape if the defendant is in the sheriff's custody at the return of the writ, and is afterwards allowed to go at large, "for ever so short a time,"¹¹ without the consent of the plaintiff or the order of a court of competent jurisdiction, or if he be rescued from the county gaol.¹² At common law the remedy for an escape was by action on the case. Various statutes gave an action for damages; but by 5 & 6 Vict. c. 98, s. 11,¹³ the old law was restored by an enactment that the sheriff was only to be liable for damages for an escape. By the Sheriffs Act, 1887,¹⁴ sec. 16, the sheriff's liability for an escape is preserved except as to persons in prison.

There is a difference where the escape is by rescue by the King's enemies of another kingdom, and where it is by traitors and robbers: in the former the sheriff is not, in the latter he is liable.¹⁵ If the

¹ *Towne v. Crowder*, 2 C. & P. 355.

² *Stevens v. Beckes*, 3 Blackf. (Ind.) 88.

³ *Perkinson v. Gilford*, Cro. Car. 539.

⁴ And without any demand of payment: *Dale v. Birch*, 3 Camp. 347; *Longdill v. Jones*, 1 Stark. (N.P.) 345.

⁵ *Stockdale v. Hansard*, 11 A. & E. 253.

⁶ *Perkinson v. Gilford*, Cro. Car. 539; *Morland v. Pellat*, 8 B. & C. 722.

⁷ Per Parke, B., sitting alone: *Barton v. Gill*, 12 M. & W. 315.

⁸ *Stockdale v. Hansard*, 11 A. & E. 253.

⁹ *Heenan v. Evans*, 3 M. & G. 398.

¹⁰ Per Parsons, C.J., *Colby v. Sampson*, 5 Mass. 311, at 312.

¹¹ *Hawkins v. Plomer*, 2 W. Bl. 1048. In this case the sheriff was held liable for the whole debt, as the debtor was seen at large at noon in the Temple with nobody with him.

¹² Bac. Abr. Escape (D.).

¹³ Repealed 37 & 38 Vict. c. 96.

¹⁴ 50 & 51 Vict. c. 55.

¹⁵ *Southcote's Case*, 4 Co. Rep. 83 b; Bul. N. P. 68.

prisoner be removed from the county gaol in charge of the goaler, without due authority, to another place, and then reconveyed back,¹ an escape is held to have been permitted, for which the sheriff was liable. The common law rule is that nothing short of the act of God or the King's enemies excuses a sheriff for an escape of a prisoner in his hands.² In *Howden v. Standish*,³ however, it is said that "the return of a rescue is good in an exceptional case, being a matter of indulgence to the sheriff, who cannot always have the *posse comitatus* with him, in consequence of the possibility that he may be taken unawares, and called on to execute the writ when he has no sufficient force"; but this was only in *mesne* process, and was an exception not to be extended,⁴ and is now practically obsolete. In no case was an action allowed if the sheriff's act was the result of the plaintiff's misconduct.⁵ A prisoner had to be actually delivered over to the new sheriff before he becomes liable for his escape;⁶ and the new sheriff is not chargeable with what was done by his predecessor.⁷

Rescue, when condoned to the sheriff.

In the case of an arrest on *mesne* process⁸ an action against the sheriff for an escape *mesne* process could not be maintained unless actual damage were shewn; for example, that the plaintiff was delayed or prejudiced in his suit.⁹ The law in this respect is not altered by the Sheriffs Act, 1887.¹⁰ Where escape is on final process there is a difference; for "if the plaintiff has taken the prisoner in execution he has a right to the detention of the body at all times; and the loss of that advantage for an hour is an infringement of the right. That applies to the case where final process having issued, the sheriff negligently omits to arrest. There the plaintiff has a right of action from the first hour during which the sheriff might arrest, but does not. But the amount of damages is a question for the jury."¹¹ The measure of damages is stated in *Arden v. Goodacre*¹² to be the value of the custody of the debtor at the time of the escape. In *Macrae v. Clarke*,¹³ the debtor, who was insolvent, was

Mesne process.

¹ *Williams v. Mostyn*, 4 M. & W. 145. Cp. 8 & 9. Will. III. c. 27, s. 8. Watson, Sheriff (2nd ed.), 200; 50 & 51 Vict. c. 55, s. 16.

² *Alsept v. Eyles*, 2 H. Bl. 108.

³ 6 C. B. 504, at 522. Bul. N. P. 61 a, ch. 5, Of Rescous.

⁴ *Crompton v. Ward*, 1 Stra. 429, at 436.

⁵ *Hiscocks v. Jones*, M. & M. 269.

⁶ *The King v. The late Sheriff of Middlesex*, 4 East 604, where the authorities are considered by Lord Ellenborough, C.J.

⁷ *Westby's Case*, 3 Co. Rep. 71 b.

⁸ As to this now, 1 & 2 Vict. c. 110, s. 1, and 32 & 33 Vict. c. 62, s. 6.

⁹ *Planck v. Anderson*, 5 T. R. 37; *Williams v. Mostyn*, 4 M. & W. 145. Damage must be stated: *Randell v. Wheble*, 10 A. & E. 719. As to measure of damages, *Moore v. Moore*, 25 Beav. 8.

¹⁰ 50 & 51 Vict. c. 55, s. 16.

¹¹ Per Coleridge, J., *Clifton v. Hooper*, 6 Q. B. 468, at 475.

¹² 11 C. B. 371.

¹³ L. R. 1 C. P. 403

the only son of a man of considerable wealth over a hundred years of age. The judge directed the jury to give as damages the value of the chance that the debt or any part of it would have been extracted by the debtor's remaining in prison. This direction was upheld on the ground that "in estimating the value of the custody you may give evidence of the position of the debtor, having regard to all his surrounding circumstances so far as they affect that probability." The power to arrest either on *mesne* process or in satisfaction is now practically obsolete in England, though traces of it may yet be noted, as in the case of a *ne exeat regno*,¹ or imprisonment under the Debtors Act, 1869.² The subject is noticed here mainly to illustrate the legal position of the sheriff, and as throwing light, possibly, on the nature of duties he still has to discharge.

Sureties on a replevin bond.

If the sheriff take sureties on a replevin bond, he is bound to exercise an ordinary and reasonable discretion, though he is not to be considered to warrant the sufficiency of the sureties; so that he is justified in accepting one who appears a person of responsibility as surety, without making inquiries.³ If he has reason to suspect the solvency of a surety, or has means of satisfying himself with respect to solvency, which he neglects to use, and the surety turns out insufficient, he is liable;⁴ as if it were shewn that the sureties were in debt, and though requested, had not paid, or that the sheriff had knowledge of unsatisfied executions against them.⁵ If the sheriff has no knowledge of the sureties, he must inform himself about them, and not trust implicitly to their own sworn statements.⁶ Failing to do this, he is liable; and the penalty of the bond, which is the value of the goods taken, is the limit of the damages.⁷

II. At suit of person whose person or goods are taken.
Wrong name.

II. The sheriff may be liable at the suit of the person whose body or goods are taken.

If the defendant were styled by a wrong name in a writ of *mesne* process, either against his goods or his person, the sheriff was liable to an action for trespass⁸ for executing the writ unless—

1. The name was *idem sonans*.⁹

¹ Beames, *Ne Exeat Regno*; Story, *Eq. Jur.* §§ 1464–1477; *Vin. Abr. Ne exeat regnum*.

² 32 & 33 Vict. c. 62.

³ *Hindle v. Blades*, 1 Marsh. 27; 5 Taunt. 225. The English cases are collected and considered in *Norman v. Hope*, 13 Ont. R. 556, affirmed 14 Ont. R. 287.

⁴ *Scott v. Waithman*, 3 Stark. (N.P.) 168; *Saunders v. Darling*, Bull. N. P. 60 c.

⁵ *Gwyllim v. Scholey*, 6 Esp. (N.P.) 100.

⁶ *Jeffery v. Bastard*, 4 A. & E. 823.

⁷ *Yea v. Lethbridge*, 4 T. R. 433; *Evans v. Brander*, 2 H. Bl. 547.

⁸ *Cole v. Hindson*, 6 T. R. 234; *Shadgett v. Clipson*, 8 East 328.

⁹ *Ahitbol v. Beneditto*, 2 Taunt. 401, or unless the defendant had acquiesced in the use of the wrong name. If the defendant were arrested by a wrong Christian name the Court would have discharged him on motion, and the sheriff would have been liable

2. The defendant was known by the name equally with some other.¹

3. The defendant had temporarily adopted it.²

For executing a writ of final process against a defendant wrongly named in the writ no action lies against the sheriff, if the person upon whom the writ is executed is in fact the person against whom the writ was issued.³

If there are two persons of the same name and address, and the sheriff through inadvertence executes the writ against the wrong person, he is liable to an action.⁴

If the sheriff's officer take the goods of the wrong person, the sheriff is liable for the act of his officer⁵ unless the person was himself instrumental by giving false information to the sheriff or otherwise. After notice of the real state of facts the sheriff acts at his peril.⁶ Wrong person's goods taken.

For any abuse whatever in the execution of process an action lies against the sheriff.⁷ For example, where the officer arrests a person on a *fi. fa.* ;⁸ or arrests,⁹ or removes him out of the bailiwick,¹⁰ unless the arrest is on fresh pursuit after an escape,¹¹ or the removal by *habeas corpus* ; or arrests him after the return day of the writ ;¹² or breaks open an outer door, save in the excepted cases ;¹³ or executes a writ after a direction from the plaintiff not to do so ;¹⁴ or if he remain in possession an unreasonable time,¹⁵ or be guilty of any other excess, even though such excess be committed by the officer contrary to the express instructions of the under-sheriff.¹⁶ The sheriff is not liable to the forfeiture of £200 Abuse of process.

to an action : *Wilks v. Lorck*, 2 Taunt. 400. What *idem sonans* means is shewn in *Parchman v. State*, 28 Am. R. 435, and note 439.

¹ *Scandover v. Warne*, 2 Camp. 270; *Fisher v. Magnay*, 1 D. & L. 40.

² *Price v. Harwood*, 3 Camp. 108; *Crawford v. Satchwell*, 2 Str. 1218; but the sheriff was not bound to keep one in custody, who he was justified in keeping, by reason of his having given a false name, *Morgans v. Bridges*, 1 B. & Ald. 647; see *Brunskill v. Robertson*, 9 A. & E. 840.

³ *Price v. Harwood*, 3 Camp. 108; *Walker v. Willoughby*, 6 Taunt. 530; *Reeves v. Slater*, 7 B. & C. 486; *Fisher v. Magnay*, 1 D. & L. 40.

⁴ *Jarmain v. Hooper*; 6 M. & G. 827. In *Morris v. Salberg*, 22 Q. B. D. 614, the execution creditor who misled the sheriff was held liable. See *Feltham v. Terry*, 1 Cowp. 419.

⁵ *Ackworth v. Kempe*, 1 Doug. 40.

⁶ *Davies v. Jenkins*, 11 M. & W. 745; *Dunston v. Paterson*, 2 C. B. N. S. 495.

⁷ *Dalton, Sheriff*, 497. The Abuses practised by some Sheriffs, Under-sheriffs, and Bailiffs.

⁸ *Smart v. Hutton*, 8 A. & E. 568 n.

⁹ *Greenshield v. Pritchard*, 8 M. & W. 148. In this case the Court refused to discharge a person who had been arrested under a *ca. sa.* in a wrong county after the lapse of a year, but left him to his action.

¹⁰ *Olliet v. Bessey*, Sir T. Jones, 214.

¹¹ *Dalton, Sheriff*, 23.

¹² *Parrot v. Mumford*, 2 Esp. (N.P.) 585.

¹³ *Lee v. Gansel*, 1 Cowp. 1.

¹⁴ *Baker v. St. Quintin*, 12 M. & W. 441.

¹⁵ *Playfair v. Musgrove*, 14 M. & W. 239.

¹⁶ *Ratcliffe v. Burton*, 3 B. & P. 223. The Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 29, imposes a penalty on any sheriff's officer who "takes or demands any money or

provided by sec. 29 of The Sheriffs Act, 1887,¹ in respect of the wrongful act of the sheriff's officer; that is incurred only by way of penalty for personal misconduct or neglect.²

Sheriff liable
in *trover*.

The sheriff is liable in *trover* for seizing goods under a defeasible title, which has subsequently determined.³ He cannot be compelled to make restitution of goods sold under a *fi. fa.*, though the judgment on which it is based is reversed.⁴

Sheriff's liability under
8 Anne, c. 14.

The sheriff is liable to the landlord, under 8 Anne c. 14, s. 1,⁵ for not paying over a full year's rent, if the same is due, before satisfying the execution creditor's claim out of goods seized.⁶ This action lies after the death of the landlord by his executor or administrator.⁷ To render the sheriff liable notice of the rent being due must be given him whilst the proceeds are in his hands.⁸ In the action, the landlord may recover whatever is the amount of the actual damage sustained by him through the sheriff's neglect.⁹

Lord Esher,
M.R.

In a very late case¹⁰ Lord Esher, M.R., states the law under the statute: "When notice has been given by the landlord to the sheriff that rent is due, it becomes the duty of the sheriff under the statute not to sell anything upon the demised premises till the rent has been paid. Even if there are goods upon the demised premises of a value many times exceeding the amount of rent due, his duty is the same. He must refuse to sell the smallest part of the goods until the claim of the landlord is satisfied. Now, of course, the sheriff is not bound to find money with which to satisfy the claim of the landlord. He must,

reward under any pretext whatever other than the fees or sums allowed by the Act or any other Act." *Lee v. Dangar* (1892), 1 Q. B. 231, per Denman, J., affirmed (1892), 2 Q. B. 337, and *Shoppée v. Nathan* (1892), 1 Q. B. 245, per Collins, J., are decisions upon this section. As to what is a demand see *Trustee of Woolford's Estate v. Levy* (1892), 1 Q. B. 772. As to Extortion see Com. Dig. "Extortion." *Smythe's Case*, Palm. 318; *Pilkington v. Cooke*, 16 M. & W. 615.

¹ 50 & 51 Vict. c. 55.

² *Bagge v. Whitehead* (1892), 2 Q. B. 355.

³ *Cooper v. Chitty*, 1 Burr. 20; *Whitmore v. Greene*, 13 M. & W. 104.

⁴ *Hoe's case*, 5 Co. Rep. 89 b. The case of goods sold on a *capias utlagatum* was distinguished, for these on reversal of the outlawry were restored.

⁵ c. 18 Ruffhead.

⁶ *Riseley v. Ryle*, 11 M. & W. 16; cp. *Green v. Austin*, 3 Camp. 260. An action for money had and received cannot be maintained by a landlord to recover rent against the sheriff who has sold his tenant's goods under an execution. The action must be for removing goods from the premises under the execution before the year's rent is paid to the landlord. A sheriff is not bound to find out what rent is due to a landlord and pay it him under the Act unless the landlord gives him notice. *Smith v. Russell*, 3 Taunt. 400.

⁷ *Palgrave v. Windham*, 1 Stra. 212.

⁸ "To some notice he is unquestionably entitled, but as the statute has not specified any particular form there can be no dispute about the terms": *Colyer v. Speer*, 2 B. & B. 67.

⁹ *Foster v. Hilton*, 1 Dowl. Prac. Cas. 35; *Calvert v. Joliffe*, 2 B. & Ad. 418.

¹⁰ *Thomas v. Mirehouse*, 19 Q. B. Div. 563, at 566.

therefore, before he proceeds with the execution, apply to the execution creditor for the sum which is necessary. If the execution creditor provides it, the sheriff pays the landlord, and proceeds with the execution. If the execution creditor does not provide it, the sheriff cannot be called on to infringe the statute, and may return either *nulla bona* and withdraw from possession, or may himself pay the rent, looking to the execution creditor for re-imbursement, and proceed to sell. This is the position of the sheriff under the Act. If he commits a breach of duty by a wrongful sale—*i.e.*, a sale which takes place before the rent is paid—the statute appears to me to state by implication that he will be liable to compensate the landlord by paying him the amount of rent which is due. This is the consequence of the enactment which makes the removal without payment of rent illegal. It is only upon payment of the rent that the sheriff is entitled to remove the goods. The cases, however, shew that though the amount of the rent is *prima facie* the measure of the damages, it is open to the sheriff after the landlord has proved his case by giving evidence of the tenancy, the amount of rent due, and notice, to shew in mitigation of damages that the value of the goods removed was not sufficient to pay the rent. In such case the loss to the landlord by the removal of the goods, or, in other words, their value to him at the time of the removal, becomes the measure of damages.”

It is no ground for reduction of damages for the sheriff to say in an action for the wrongful taking of goods, “I have paid the rent,” since, being a wrongdoer, he has no right to take upon himself to apply the proceeds of the sale;¹ thus, if the plaintiff recovers, he is entitled to the full value of the goods. Where the sheriff has seized and sold goods let for hire to the execution debtor, the sheriff is only liable for the actual damage the real owner sustains.²

Payment of rent no ground for reduction of damages in action for wrongful taking of goods.

The sheriff³ was in no case entitled to notice of action for things done by him in executing the process of the Court. Now

¹ White v. Binstead, 13 C. B. 304.

² Tancred v. Allgood, 4 H. & N. 438.

³ Atkinson, Sheriff (6th ed.), 302. For this he cites Copland v. Powell, 1 Bing. 369. The head-note of that case is “a sheriff who levies arrears of taxes under 48 Geo. III. c. 141, No. 5, par. 2, is not entitled to notice of an action to be brought against him for anything done under the provisions of that Act.” In the judgment Park, J., says, at 373: “The sheriff is called upon to do nothing more than is within the usual and general scope of his duty—viz., to obey the process and conform to the directions of a Supreme Court; he exercises no judgment, and no peculiar burdens are cast upon him; and it as well might be contended that he was entitled to a notice of action for an excessive levy, upon any common writ of *fi. fa.*, as upon this. By the law of England, bringing an action is sufficient demand and notice; and wherever the contrary is the case, it is and must be matter of legislative enactment.”

Notice of Action has been abolished by the Public Authorities Protection Act, 1893.¹

III. HIGH BAILIFFS OF COUNTY COURTS.

The County Courts Act, 1888, repealing 9 & 10 Vict. c. 93, s. 33.

By the County Courts Act,² 1888, the high bailiff of the County Court is made responsible for all the acts and defaults of himself and the bailiffs appointed to assist him, in like manner as the sheriff in any county in England is responsible for the acts and defaults of himself and his officers.

The high bailiff's liability is co-extensive with that of the sheriff,³ save where his bailiffs act under colour of some special power or authority of the County Court Acts, and not in the execution of a warrant.⁴

IV. PUBLIC SERVANTS, CLERKS, AND REVENUE OFFICERS.

The position of that large class of public servants, clerks, revenue officers, and the rest, who are charged with the performance of acts which bring them into relations, from time to time, with various members of the community, must shortly be noticed.

Rule stated by Lord Mansfield too broad.

The rule stated by Lord Mansfield, C.J., in *Whitfield v. Lord Le Despencer*:⁵ "Whoever does an act by which another person receives an injury is liable in an action for the injury sustained," is too absolutely expressed, since the idea of duty is absent. There are a multitude of acts which, working injury to others, are yet absolutely without remedy. It is the notion of duty which is the determining test. Best, C.J.'s,⁶ expression of the law is often quoted, and states well the general principle.

Statement by Best, C.J., in *Henly v. Mayor of Lyme Regis*.

"I take it to be perfectly clear that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer." A relevant instance of this principle is to be found in *Robinson v. Gell*,⁷ where an action was brought for injury sustained by negligently preparing a notice of judgment. The Court of Common Pleas held that as the Act of Parliament, which constituted the office, the occupant of which was sued for neglect, did not

Robinson v. Gell.

¹ 56 & 57 Vict. c. 61.

² 51 & 52 Vict. c. 43, s. 35.

³ *Burton v. Le Gros*, 34 L. J. Q. B. 91.

⁴ *Smith v. Pritchard*, 8 C. B. 565.

⁵ 2 Cowp. 754, at 765.

⁶ *Henly v. Mayor, &c., of Lyme*, 5 Bing. 91, at 107, 1 Bing. N. C. 222.

⁷ 12 C. B. 191.

contemplate his giving notices of the kind in question, there was no duty, and therefore no liability, though there was negligence. Had the Act provided for the issuing of the notice, a duty would have thereby been imposed upon the officer towards those who were in the position to receive the notice, and negligence in the discharge of the duty thus created would be actionable. Subject to this qualification being read in, the law seems to be as laid down in *Jenner v. Joliffe*:¹ "In every case where an officer is entrusted by the common law or by statute, an action lies against him for a neglect of the duty of his office; so for every fraud or neglect in the execution of his office;" or, as was said in *Barry v. Arnaud*:² "The defendant then is a public ministerial officer, and, being so, he is responsible for neglect of his duty to any individual who sustains damage by such neglect."

Jenner v. Joliffe.

One more inquiry remains: What amount of want of care constitutes negligence in these cases? It would seem that the assumption of an office implies the possession of qualifications for the efficient performance of its duties. The amount of care necessary consequently varies with the greater or less complexity of the duties of the office. The officer must shew that diligence which a conscientious and capable man, versed in the duties of the particular office, is expected to shew in the performance of them.³

Degree of care demanded from public servants.

This statement has reference only to the remedy of one of the public injured through the officer's neglect. The liability of the negligent officer may be different, as it affects the Crown or a private individual; though it has been objected that, in any case, for failure of duty amounting to a breach of trust or fraud of a pecuniary nature, the remedy must be for a civil injury and not by indictment. In *Bembridge's case*,⁴ Lord Mansfield considers the matter, and points out the two principles that may become applicable. "The first I will venture

Duty of public servants to the Crown.

Bembridge's case, Lord Mansfield's statement of the law.

¹ 9 Johns. (Sup. Ct. N.Y.), 381, at 385. The quotation in the text is little more than a reproduction of a portion of the judgment of Holt, C.J., in *Lane v. Cotton*, 1 Salk. 17. See *Pickering v. James*, L. R. 8 C. P. 489; *In re Thornbury Election Petition*, 16 Q. B. D. 739.

² 10 A. & E. 646, the case of a collector of customs. See *Davis v. Black*, 1 Q. B. 900, where an action was brought against a clergyman for neglect to perform the marriage service when required. The duty of a clergyman in that matter was said to be not the same with that of a registrar under 6 & 7 Will. 4, c. 85.

³ Wharton, *Negligence*, §§ 297, 785; Shearman and Redfield, *Negligence* (4th ed.), §§ 590-593; *Jones v. Bird*, 5 B. & Ald. 837; *Jacobsohn v. Blake*, 6 M. & G. 919, where goods were taken possession of by Custom House officers. Story, J., in *Burke v. Trevitt*, 1 Mason (U.S.) 96, has a long judgment on the duty of officers who have the custody of property seized. He maintains two positions: (1) If an officer of the revenue seize goods without probable cause he is responsible for all losses and injuries however occasioned. (2) If he seize them with probable cause he is responsible only for losses and injuries occasioned by ordinary neglect. *Eslava v. Jones*, 3 Am. St. R. 699 is an action against a clerk of court for wrongfully issuing a writ of *restitutioni exponas* whereby the plaintiff was put to defend his title to land in an action. Held not legal damage.

⁴ 22 How. St. Tr. 1, 155.

to lay down," he says, "is, that if a man accepts an office of trust and confidence, concerning the public, especially when it is attended with profit, he is answerable to the king for his execution of that office; and he can only answer to the king in a criminal prosecution, for the king cannot otherwise punish his misbehaviour in acting contrary to the duty of his office, and that this holds equally by whomsoever or howsoever he is appointed to the office, by whomsoever the office is given. There are many offices of a public nature that concern in various ways the whole kingdom and the king as the executive part of the Constitution, which are not given directly by the king, and not given by letters patent; many that have the grants of offices; the Lord Steward the grant of the judge of the Marshalsea; the Lord Chancellor appoints the Masters in Chancery; and I have the appointment of a great many officers belonging to this Court.¹ And there is a precedent in Vidian's Entries,² an information against the *custos brevium* for so negligently keeping the records of the Court that one of them was lost; had that been the steward of a manor who had lost one of his lord's rolls, an action would have laid; but the duty of this officer concerning the public it was a matter of an information, and yet the office was appointed by the Chief Justice, not constituted by the king. There is another principle, too . . . that is this: Where there is a breach of trust, a fraud, or an imposition in a subject concerning the public, which, as between subject and subject, would only be actionable by a civil action, yet, as that concerns the king and the public, . . . it is indictable."³

Publicservants
giving bonds
for the dis-
charge of their
duties.

It has been held in the United States that where public officers are entrusted with public funds and give bonds for the discharge of their official duties, their duty is not limited by the considerations that would apply in bailments. Their liability is larger than this, and is fixed by their bonds; so that when money is stolen from them without their fault or negligence, they do not become released from liability thereby.⁴

¹ The right to the appointments in Courts of Justice is considered in *Harding v. Pollock*, 2 St. Tr. N. S. 341. The right of the Chief Justice to appoint officers in his Court was acquired by prescription, 355.

² 213. *The Exact Pleader: A book of Entries of Choice, Select, and Special Pleadings in the Court of King's Bench in the reign of his present Majesty King Charles II. with the method of proceeding in all manner of actions in the same Court.* By Andrew Vidian Gent. 1684.

³ Lord Mansfield then cites precedents shewing that a public officer is indictable for misbehaviour in office, even where as against a private person he would merely be liable to an action for money had and received.

⁴ *State v. Nevin*, 3 Am. St. R. 873; the cases—American—are set out here and lengthily considered; *Board of Education v. Jewell*, 20 Am. St. R. 586. In *Theodore Hook's case* there was probably legal fault and negligence, see 72 *Quarterly Review*, 71 *et seqq.*, an article attributed to J. G. Lockhart.

In Scotland there is an old decision that clerks of session are liable for the loss of writs out of their respective offices, without proof of negligence; "for the clerks who have the custody of writs ought to exoner themselves of their trust by proving the *casus fatalis*."¹

¹ *Home v. M'Kenzie* (1735), Morison, Dictionary of Decisions, 13,123; *Alstoun v. Riddel* (1680), *ibid.* 13,957; *ibid.* Public Officer, 13,089; Reparation, sec. viii. Negligence in Office, 13,956; Clerk liable for issuing defective precept, *Henderson v. Drysdale*, 9 Shaw 536; Guthrie, Law of Damages (2nd ed.), 84-88. The principle of the liability of a public officer to any one injured directly by the performance of the duties of his office is very clearly stated by Lord Lyndhurst, C., *Ferguson v. Kinnoull*, 9 Cl. & F. 251, at 283, 4 St. Tr. N. S. 785, at 808, and *post*, 330. A volunteer undertaking to perform duties in connection with judicial process is liable for negligence in not performing his undertaking, if thereby the person for whom he undertakes suffers damage; as in *Chapman v. Morley*, 7 Times L. R. 257, where an order was made against plaintiff in a County Court committing him to prison, but was suspended so long as he paid £1 a month into Court. The defendant, the judgment creditor, wrote asking for the payment direct, promising to pass it through the Court. The plaintiff paid the defendant, but the defendant did not pass it through the Court, whereby the plaintiff was arrested on a warrant and imprisoned. Defendant was held liable for breach of duty.

CHAPTER III.

CORPORATIONS AND LOCAL ADMINISTRATIVE BODIES.

WE have now to consider any special aspects of negligence arising from the constitution and powers of those various Corporations, boards and bodies of trustees which are entrusted with the chief administrative functions of local government.

Corporations
as owners of
property.

Corporations, so far as they are owners and occupiers of land and houses, are regarded in the same light as individual owners and occupiers, and dealt with accordingly. They are bound to repair bridges, highways, and churches ; are liable to poor rates, and to the discharge of any other duty or obligation to which an individual owner is subject.¹ "While," says a New York decision dealing with this point,² "as such owners, they [the defendants, a corporation] enjoy, in respect of this property, all the rights to which private persons would be entitled, they are subject also to the same duties and obligations in respect to others owning adjacent lands, that the law imposes upon private persons owning real estate. That the premises in question are held as a public trust, and that no private gain or profit is to be derived from their possession, does not in the least diminish, or vary, the duties and obligations of the Common Council, in respect to adjacent owners, whose rights may be injuriously affected by a particular mode of using this property. The great injunction of the law, addressed to all proprietors of real estate, is : 'So use your own as not to injure another ;' and a municipal corporation owning lands is as much bound to the observation of this precept as a private person. The citizen, and the municipal body, in respect to their several possessions of real estate, stand upon a footing of equality ; neither is a privileged owner, and each must fulfil the same duties in respect to the other. . . . The idea

¹ 2 Co. Inst. 703 ; *Thursfield v. Jones*, Sir T. Jones, 187 ; *Rex v. Gardner*, 1 Cowp. 79 ; *Mayor of Lynn v. Turner*, 1 Cowp. 86 ; *Henly v. Mayor of Lyme*, 5 Bing. 91, 1 Bing. N. C. 222 ; *Cowley v. Mayor, &c., of Sunderland*, 6 H. & N. 565 ; *Manley v. St. Helen's Canal and Railway Company*, 2 H. & N. 840.

² *Brower v. Mayor, &c., of New York*, 3 Barb. (N. Y.) 254, at 257.

of the irresponsibility of such a corporation' "can only be entertained by the Courts where the corporation is in the exercise of a purely governmental function; as when it is either declaring a law in a legislative capacity, or, in a ministerial one, executing it, without injuriously affecting the property or rights of particular persons."

Corporations are also liable for the torts of their servants done within the scope of their employment.¹ It has been sought to draw a distinction between their liability where they perform public duties under the authority of Acts of Parliament, from which they receive neither emolument nor profit; and where they form a mere private company, using their own works, and receiving profit for the benefit of their members. The two views are set out in *Parnaby v. Lancaster Canal Company*² and *Hall v. Smith*.³

Distinction taken between corporations performing public duties; and those engaged in purposes of mere private profit.

In *Parnaby v. Lancaster Canal Company*,⁴ which was an action against a canal company for allowing a boat sunk in their canal to remain, whereby the plaintiff was injured, Tindal, C.J., in the Exchequer Chamber, thus deals with the objection that there was no duty on them, as constituted by Act of Parliament, to remove the obstruction: "The facts stated in the inducement shew that the company made the canal for their profit, and opened it to the public upon the payment of tolls to the company; and the common law in such a case imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property. We concur with the Court of Queen's Bench in thinking that a duty of this nature is imposed upon the company, and that they are responsible for the breach of it upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable for neglect on leaving a trap-door open without any protection, by which his customers suffer injury."

Parnaby v. Lancaster Canal Company.
Tindal, C.J.'s judgment.

¹ *Yarborough v. Bank of England*, 16 East 6; *Maund v. Monmouth Railway Company*, 4 M. & G. 452; *Smith v. Birmingham Gas Company*, 1 A. & E. 526. "Strictly speaking, a corporation cannot itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished through the agency of individuals; and there can be no doubt that, if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation": per Lord Cranworth, C., *Ranger v. Great Western Railway*, 5 H. L. C. 72, at 86. See Lindley, *Companies* (5th ed.), 208.

² 11 A. & E. 223.

³ 2 Bing. 156.

⁴ 11 A. & E. 223, per Tindal, C.J., at 242.

Hall v. Smith. *Hall v. Smith*¹ asserts a distinction in the case of trustees for the public, who do not make a profit from performance of the duties out of which the negligent act arises. Clerks to commissioners of public works were sued for negligence of workmen, employed on the public works, in leaving a quantity of rubbish unguarded and unlighted on the highway. Best, C.J., in giving judgment, after a review of the earlier cases, thus concludes: "From these cases I collect that the law recognizes the principles which I ventured to state were founded in sound policy and justice, and that no action can be maintained against a man acting gratuitously for the public for the consequences of any act which he was authorized to do, and which, so far as he is concerned, is done with due care and attention, and that such a person is not answerable for the negligent execution of an order properly given."

Best, C.J.'s,
judgment.

Distinction
considered.

The position there laid down—that by the general law of the country, trustees for public purposes are not liable in their corporate capacity to make compensation for damages sustained by individuals from the neglect of the servants of such trustees to perform the duties imposed on them; or at least that their duty is limited to the exercise of due care in the choice of their officers, and that redress is to be obtained against the negligent officer alone—was advanced in several cases, though on grounds that, on examination, do not prove satisfactory.

First, it was argued that such a ground of decision was implied from the cases deciding that where a person is a public officer in the sense that he is a servant of Government, and, as such, has the management of some branch of the Government business, he is not responsible for any negligence or default of those in the same employment as himself.²

A further examination will shew that these cases are decided on the ground that the Government is the principal and the defendant merely a servant; so that, on well recognised principle, the action must be brought either against the principal or against the immediate actors in the wrong.

Secondly, it was argued that where an act is done for a public purpose it cannot be considered wrongful. Against the applicability of this it may be pointed out that the principle is that the act is not wrongful, not because it is for a public purpose, but because it is authorized by the Legislature;³ and this is seen

¹ 2 Bing. 156.

² *Lane v. Cotton*, 1 Salk. 17, 1 *Ld. Raym.* 646; *Whitfield v. Lord Le Despencer*, 2 Cowp. 754; *Nicholson v. Mouncey*, 15 East 384.

³ *London and Brighton Railway Company v. Truman*, 11 App. Cas. 45.

from the fact that where the statutory work has been inefficiently performed the plaintiff has recovered.¹

Authorities to the contrary undoubtedly exist. These were examined, in the opinion of Blackburn, J., given before the House of Lords, in the case of Mersey Docks and Harbour Board Trustees *v. Gibbs*,² and were held by the House to be overruled by preponderant authority.³ The question is accordingly set at rest by the decision of the House of Lords, establishing that there is no difference in principle arising from the fact that trustees do not make a profit, and are acting merely for the benefit of the public.⁴ A minute examination of the older cases is therefore unnecessary. It is sufficient to indicate that the whole learning of the subject is collected in the two opinions of Blackburn, J., given in *Coe v. Wise*⁵ and in *Mersey Docks Trustees v. Gibbs*.⁶

The canon of construction is stated by Blackburn, J., in delivering the opinion of the consulted judges,⁷ to be: "In the absence of something to shew a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same thing." Moreover, where it is alleged that any statutory body is exempted from liability for damage done by its officers to persons outside its authority, "such a

Mersey Docks and Harbour Board Trustees v. Gibbs.

Canon of Construction.

¹ *Leader v. Moxon*, 3 Wils. 461; 2 W. Bl. 924; *Grocers' Company v. Donne*, 3 Scott 356; *Jones v. Bird*, 5 B. & Ald. 837.

² L. R. 1 H. L. 93; *Baker v. Harris*, 4 M. & S. 27; *Duncan v. Findlater*, 6 Cl. & F. 894; *Holliday v. St. Leonard, Shoreditch*, 11 C. B. N. S. 192; *Metcalf v. Hetherington*, 11 Ex. 257, considered *Grant v. Sligo Harbour Commissioners*, Ir. R. 11 C. L. 190, following *Campbell v. Hornsby*, Ir. R. 6 C. L. 37. See, too, *Richardson v. Corcoran*, 7 Ir. C. L. R. 121.

³ *Scott v. Mayor of Manchester*, 1 H. & N. 59, affd. 2 H. & N. 204; *Ward v. Lee*, 7 E. & B. 426; *Clothier v. Webster*, 12 C. B. N. S. 790; *Southampton and Itchin Bridge Company v. Southampton Local Board*, 8 E. & B. 801; *Ruck v. Williams*, 3 H. & N. 308; *Whitehouse v. Fellows*, 10 C. B. N. S. 765; *Brownlow v. Metropolitan Board of Works*, 13 C. B. N. S. 768, 16 C. B. N. S. 546. See, too, *Coe v. Wise*, 5 B. & S. 440; and an Irish Case (Ex. Ch.), *Levingston v. Guardians of the Lurgan Union*, Ir. R. 2 C. L. 202.

⁴ Lord Wensleydale was able to arrive at this conclusion only in deference to the authority of *Mersey Docks and Harbour Board v. Cameron*, 11 H. L. C. 443. See *Glavin v. Rhode Island Hospital*, 34 Am. R. 675.

⁵ 5 B. & S. 440, at 458, in the Ex. Ch. 7 B. & S. 831.

⁶ L. R. 1 H. L. 93, at 102: *The Queen v. Williams*, 9 App. Cas. 418; *The Turkistan*, 13 Rettle 342. In *Dormont v. Furness Railway Company*, 11 Q. B. D. 496, where a ship was wrecked in the channel of a harbour which, under the Wrecks Removal Act, 1877 (40 & 41 Vict. c. 16), s. 4, the defendants had power to keep clear by removing obstructions therefrom, Kay, J., held that a duty was imposed on them to remove the wreck from the channel, or to mark its position by buoys, and that the case came within the principle of *Mersey Docks v. Gibbs*. See also *The Sanitary Commissioners of Gibraltar v. Orfila*, 15 App. Cas. 400, where the cause of the accident was not within the statutory authority of the Commissioners. In *Grant v. Sligo Harbour Commissioners*, Ir. R. 11 C. L. 190, it was held that Harbour Commissioners cannot be sued for not cleansing, deepening, or removing obstructions from a harbour, if they have not funds to enable them to do so.

⁷ L. R. 1 H. L. 93, at 110.

limitation ought to be clearly expressed, and any enactment that is vouched as effecting such a limitation ought to be strictly construed." ¹ In the case in which this was said, it was decided to be not enough to exonerate commissioners from paying damages that there is a proviso in the Act, which constitutes them, "that the total amount to be expended under this Act for the above purposes, save as to interest, shall not exceed the sum of £15,000," even where the full amount they are authorized to raise has been expended. They must, in addition, raise funds to pay adequate compensation in cases where a liability for negligence is established against them.²

Statement of the law by Blackburn, J., in *Foreman v. Mayor of Canterbury*.

In *Foreman v. Mayor of Canterbury*,³ Blackburn, J., thus summarizes the decision in *Mersey Docks v. Gibbs*: "It was decided that a public body, like the local board of health, are answerable for the negligence of their servants, just as if they were acting as the servants of a private person, and not for a corporation incorporated for a public purpose. Of course, the individuals composing the body are not responsible; it is the local board of health that are responsible; and they would have to pay the damages out of the funds in their hands as a local board of health."⁴

Dilemma stated by Lord Cottenham in *Duncan v. Findlater*.

In *Duncan v. Findlater*,⁵ Lord Cottenham constructs a dilemma which forcibly states a difficulty of frequent occurrence. "If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it; and this is clear on the legal presumption that the act creating the damage being within the statute must be a lawful act. On the other hand, if the thing done is not within the statute, either from the party doing it having exceeded the powers conferred on him by statute, or from the manner in which he thought fit to perform the work, why should the public fund be liable to make good his private error or misconduct?"

Legislative authorization of a particular act.

Although the general presumption of law is that the liability of the legally created body is, to the extent of their funds at least,⁶

¹ Per Lord Esher, M.R., *Gallsworthy v. Selby Dam Drainage Commissioners* (1892), 1 Q. B. 348, at 354. The doctrine that a right of property cannot be taken away without compensation can be traced to D. 43, 8, 3. As to the burden on those who seek to establish that the Legislature intended to take away private rights, see per Lord Blackburn, *Managers of the Metropolitan Asylum District v. Hill*, 6 App. Cas. 193, 208.

² *Gallsworthy v. Selby Dam Drainage Commissioners* (1892), 1 Q. B. 348.

³ (1871) L. R. 6 Q. B. 214, at 218. *Gas Light and Coke Company v. Vestry of St. Mary Abbots, Kensington*, 15 Q. B. D. 1.

⁴ See 38 & 39 Vict. c. 55, s. 265, and as to London, 54 & 55 Vict. c. 76, s. 124.

⁵ 6 Cl. & F. 894, at 907.

⁶ *Ruck v. Williams*, 3 H. & N. 308; *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93, at 107. "The want of funds affords no legal excuse to the defendants. By accepting their charter they impliedly engaged to fulfil all the duties thereby imposed. A neglect

co-extensive with that imposed by the general law on individuals doing the same things, if the Legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful. Thus, where trustees of a turnpike road, or other similar official persons, are authorized to do a particular act, such as raising a road, lowering a hill, or making a drain, as in *Sutton v. Clarke*,¹ and by doing so prejudice the rights or injure the property of third persons, they are not liable to an action, provided they do no more than the Act of Parliament under which they are acting authorizes and requires them to do;² notwithstanding that a private individual doing the same thing would have been liable whether he were guilty of negligence or not. If trustees under a Turnpike Act raise a road, and thereby darken windows, no action will lie against them, provided the act done is within the scope of the duty and authority conferred upon them. Again, if injury result to a third person from the making of a drain, which would be actionable if done by a private individual, it will not be actionable if done by trustees in the performance of a duty cast upon them by an Act of Parliament. But to exempt from liability to an action, the act done by the trustees must be productive of damage, although it is done carefully and without negligence. "If the act authorized to be done by the trustees is done so carelessly or improperly that the careless or improper manner in which it is done either creates or increases the damage, the trustees will be liable."³

The obligations imposed by the statutory power must be strictly conformed to. James, L.J., forcibly expresses this in a case⁴ of those duties subjected them to an indictment; and their poverty as a corporation is no more a defence than the poverty of an individual is a defence to an action for breach of contract or to an indictment for a crime": *Waterford and Whitehall Turnpike Company v. People*, 9 Barb. (N.Y.) 161.

Where conditions of working are prescribed, these must be strictly conformed to.

¹ 6 Taunt. 29.

² In cases of this sort the injured person is usually provided for by the compensation clauses of the statute. It is now well established that there can be no right to statutory compensation unless there would, apart from the statute, have been a right to bring an action for the injury complained of: *New River Company v. Johnson*, 2 E. & E. 435. "Unless the particular injury would have been actionable before the company had acquired their statutory powers, it is not an injury for which compensation can be claimed": per Lord Campbell, C.J., *Re Penny*, 7 E. & B. 660, at 669. *City of Glasgow Union Railway Company v. Hunter*, L. R. 2 H. L. (Sc.) 78; *Caledonian Railway Company v. Walker's Trustees*, 7 App. Cas. 259. To warrant the giving of compensation, there must be an enabling power in the Act: *Hammersmith Railway Company v. Brand*, L. R. 4 H. L. 171; *Metropolitan Asylums District v. Hill*, 6 App. Cas. 193, per Lord Watson, at 212. In the United States the law appears to be otherwise, on the ground that to deprive a person of compensation is unconstitutional: *Lee v. Pembroke Iron Company*, 57 Me. 481, 2 Am. R. 59. See, too, *Mayor of Montreal v. Drummond*, 1 App. Cas. 384.

³ Per Williams, J., *Whitehouse v. Fellowes*, 10 C. B. N. S. 765, at 780; *Boulton v. Crowther*, 2 B. & C. 703; *Beaver v. Mayor, &c. of Manchester*, 8 E. & B. 44; *Ferrar v. Commissioners of Sewers of London*, L. R. 4 Ex. 1, in Ex. Ch. 227.

⁴ *Nitro-phosphate Company v. London and St. Katharine Docks Company*, 9 Ch. D. 503.

James, L.J.'s,
statement of
principle.

where an option was given by statute to a company either to construct works or to leave them alone, and, in the event of their electing to construct the works, specifying certain conditions under which they were to work. The company, professing to act in execution of their powers, varied the construction as specified in the conditions. "The words of the Act are that it should be lawful for the company to make their works according to those levels, and, of course, it was optional with them to make or not to make their works at all. But if they made them, and not to those levels, they would be in this dilemma—either from the neglect of that provision or condition the whole works were illegal, or the provision as to levels ought to be construed as imposing a distinct and separate obligation to that effect, the breach of which would not invalidate all their acts and proceedings, but would have to be remedied or punished like any other breach of statutory obligation. Of course the company would prefer their liability under the latter construction to their liability to capital punishment, which would be the consequence of the former; and we prefer that construction."

Lord Kenyon,
O.J., in *The
King v.
Holland.*

There is a more individual duty, which is indicated by Lord Kenyon, C.J., in the *King v. Holland*.¹ Objection was taken to an information against the defendant for malversations in office during the time he was a member of the Council of Madras, that the duty with breach of which the defendant was charged could only be performed by the body of which he was but a member. "In the course of the argument," said Lord Kenyon, "the Court pretty strongly intimated their opinion against this objection. They thought that each individual of the Governor and Council, who did not do what in him lay to discharge his public duty, contracted by his negligence individual guilt." This individual guilt is subsequently referred to the defendant's being "in a situation in which it was his duty to have done the acts which he neglected to do, and for the omission of which he is now accused," or to "express orders which he was bound, but neglected, to obey."²

Acts done
under statutory
authority
which, apart
from the
statutory
authority,
would consti-
tute actionable
wrongs.

Many acts done under statutory authority are only saved by the statutory authority from being actionable wrongs.

*Rex v. Pease*³ is the best known instance of this class of case.

¹ 5 T. R. 607, at 623.

² *L. c.* at 624. Compare with this what Lord Brougham says, *Ferguson v. Earl of Kinnoull*, 9 Cl. & F. 251, at 289: "If several are jointly bound to perform the duty, they are liable jointly and severally for the failure or refusal; and if it is a duty which the majority of the number is bound to perform, those who by their refusal prevent the greater number from concurring are answerable to the party injured; that is, all those who constitute a majority, such majority committing the nonfeasance, violate the duty imposed, disobey the law, occasion the injury, and are answerable for it."

³ 4 B. & A. 30; *Whitehouse v. Birmingham Canal Company*, 27 L. J. Ex. 25.

The defendants were authorized by statute to construct a railway parallel and adjacent to an ancient highway, and to use the railway for the carriage of coals in waggons drawn by locomotives worked by steam. The locomotives having frightened the horses of persons using the highway, the defendants were indicted for a nuisance; judgment, however, was entered for them on the ground that the interference with the rights of the public must be taken to have been contemplated and sanctioned by the Legislature, inasmuch as the statute under which they acted gave an unqualified authorization to the use of locomotives.

Vaughan v. Taff Vale Railway Company¹ is to the same effect. There a wood belonging to the plaintiff was set on fire by sparks from a locomotive authorized by statute. "When," said Cockburn, C.J., "the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence, that if damage results from the use of such thing independently of negligence, the party using it is not responsible." In Jones v. Festiniog Railway Company,² on the other hand, the common law liability was held to take effect, as on the construction of the defendants' private Act, there was nothing to authorize the company to use locomotive engines.

The cases were much considered in Hammersmith, &c., Railway Company v. Brand,³ and the judges were called in to advise the House of Lords. Bramwell, B., dissented from the course of the decisions. He said: "I think those cases⁴ clearly wrong, and that they have proceeded on an inadvertent misapprehension of the object and effect of the clauses in question."⁵ Lord Chelmsford, who delivered the leading opinion of the House, expressed the contrary, and prevailing, opinion: "If the cases of Rex v. Pease and Vaughan v. Taff Vale Railway Company were rightly decided, this question has been determined. It was established by those cases 'that when the Legislature has

¹ 5 H. & N. 679, at 685. The case of Gibson v. South-Eastern Railway Company, 1 F. & F. 23, and the cases referred to in the note to that case were earlier decisions, and cannot now be considered good law. Canada Central Railroad v. McLaren, 8 Ont. App. 564, at 583; see also Murdoch v. Glasgow and South-Western Railway Company, 8 Macph. 768.

² L. R. 3 Q. B. 733.

³ L. R. 4 H. L. 171, Att.-Gen. v. Metropolitan Railway Company (1894), 1 Q. B. 384; Williams v. Portland, 19 Can. S. C. R. 159, is a case where the grading of a street was lowered, and a person coming down a board from one of the houses abutting, slipped and was injured; cp. Burgess v. Northwich Local Board, 6 Q. B. D. 264; Brierley Hill Local Board v. Pearsall, 9 App. Cas. 595, at 602.

⁴ Rex v. Pease, 4 B. & A. 30; Vaughan v. Taff Vale Railway Company, 5 H. & N. 679.

⁵ Bramwell, B.'s, answer to the Lords' question, L. R. 4 H. L. 171, at 189, contains a full examination of these cases.

Vaughan v.
Taff Vale
Railway
Company.

General prin-
ciple appli-
cable as for-
mulated by
Cockburn, C.J.

Jones v.
Festiniog
Railway
Company.

Hammersmith
Railway
Company v.
Brand.

Lord Chelms-
ford's view of
the law in the
House of
Lords.

sanctioned the use of a locomotive engine, there is no liability for any injury caused by using it, so long as every precaution is taken consistent with its use.'” “With great respect to the learned Baron,¹ we do not expect to find words in an Act of Parliament expressly authorizing an individual or a company to commit a nuisance, or to do damage to a neighbour. The 86th section² gives power to the company to use and employ locomotive engines, and if such locomotives cannot possibly (*be*) used without occasioning vibration, and consequent injury to neighbouring houses, upon the principle of law that *Cuicunque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit*, it must be taken that power is given to cause that vibration without liability to an action. The right given to use the locomotive would otherwise be nugatory, as each time a train passed upon the line and shook the houses in the neighbourhood, actions might be brought by their owners, which would soon put a stop to the use of the railway. I therefore think, notwithstanding the respect to which every opinion of Mr. Baron Bramwell is entitled, that the cases of *Rex v. Pease* and *Vaughan v. Taff Vale Railway Company* were rightly decided.”³

Subsequent
cases.

In *Powell v. Fall*,⁴ a case of setting fire to a stack by sparks from a traction engine constructed in conformity with the Locomotive Acts, 1861⁵ and 1865,⁶ Mellor, J., gave judgment for the plaintiff, on the ground that the case was indistinguishable from *Jones v. Festiniog Railway Company*, and that the right to recover for damages is expressly reserved to a person sustaining injury from the use of locomotive engines authorized by the statutes. On appeal, this decision was affirmed, on the latter ground. Bramwell, L.J., however, said: “The arguments which we have heard are ingenious; but I need only say in reply to them that they have hardened my conviction that *Rex v. Pease*

¹ Bramwell, B.

² The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20).

³ L. R. 4 H. L. 171, at 202. See further *Dixon v. Metropolitan Board of Works*, 7 Q. B. D. 418, at 423; *Dunn v. Birmingham Canal Company*, L. R. 8 Q. B. 42, at 47. “Under the authority of the case (*Vaughan v. Taff Vale Railway Company*) to which reference has been made, if the canal company have done no more than the Legislature have authorized them to do, and damage results, and although there may be no clauses in the Act affording compensation, no action can be maintained;” *Boughton v. Midland Great Western Railway of Ireland Company*, Ir. R. 7 C. L. 169; also *Watkins v. Reddin*, 2 F. & F. 629, per Erle, C.J.: “The defendant has clearly no right to make a profit at the expense of the security of the public.”

⁴ 5 Q. B. Div. 597, at 601; *Evans v. Manchester, Sheffield, and Lincolnshire Railway Company*, 36 Ch. D. 626; *Galer v. Rawson*, 6 Times L. R. 17; *The Canada Atlantic Railroad Company v. Moxley*, 15 Can. S. C. R. 145. When the Railway Company have shewn that they have used the best form of locomotive, the *onus* lies on the plaintiff to shew negligence; *Port Glasgow and Newark Sailcloth Company v. Caledonian Railway Company*, 19 Rettie 608, 20 Rettie (H. L.) 35.

⁵ 24 & 25 Vict. c. 70.

⁶ 28 & 29 Vict. c. 83.

and *Vaughan v. Taff Vale Railway Company* were wrongly decided.”¹

Geddis v. Proprietors of Bann Reservoir,² in the House of Lords, further defined the principle. The defendants, having power to make a communication between a reservoir and the River Bann, exercised the power in a manner injurious to the plaintiff, owing to their not having seen the necessity of making provision for the additional quantities of water that would be sent down by reason of their works. Lord Hatherley, C., thought the case was not “within any principle which could be laid down with regard to parties keeping themselves entirely within their powers, and taking care that the powers of an Act of Parliament, when exercised, shall be exercised in a manner to prevent needless injury. We are not bound, nor entitled, to suppose that they will wilfully do injury by the exercise of the legislative powers which have been given to them; but it appears to me clearly and plainly that they should use every precaution, by the exercise either of their powers created by the Act of Parliament itself, or of their common law powers, to prevent damage and injury being done to others through whose property the works or operations are to be carried on, and to avoid subjecting them to consequences which they were not bound to anticipate from the Act of Parliament, seeing that the Act also enabled the parties who had the power to do so to prevent the mischief.”

In the Court below, *Cracknell v. The Corporation of Thetford*³ had greatly influenced the minds of the judges. The defendants, exercising powers under a private Act of Parliament to render navigable a certain river, had erected staunches in the river, the result of which, combined with the natural growth of the weeds⁴ and the accumulation of silt against the staunches, was that the river overflowed its banks and damaged the plaintiff's land, in respect of which he sued the defendants, alleging a duty on them to cut the weeds or dredge the silt. The judgment of the Court is succinctly expressed by Byles, J.: “The injury is said to have arisen, first, from the erection of the staunches; that was made legal by the Act; secondly, it is said to have arisen from the defendants not removing the silt that accumulated and the

Geddis v. Proprietors of Bann Reservoir.

Lord Hatherley, C.'s, opinion.

Cracknell v. The Corporation of Thetford.

Byles, J.'s, judgment.

¹ *Piggot v. Eastern Counties Railway Company*, 3 C. B. 229, decides that a company may be liable for not using the most effectual contrivances to prevent the emission of sparks, even though engines of greater power may be needed; or by allowing combustible matter to lie upon adjacent lands. *Smith v. London and South-Western Railway Company*, L. R. 5 C. P. 98, L. R. 6 C. P. 14.

² 3 App. Cas. 430, at 449. Cp. *Colac v. Summerfield* (1893), App. Cas. 187; *Raleigh (Corporation of) v. Williams* (1893), App. Cas. 540.

³ L. R. 4 C. P. 629.

⁴ *Parrett Navigation Company v. Robins*, 10 M. & W. 593.

weeds; but that was inevitable, because they had no power to remove them;¹ they would have been liable for trespass if they had entered on the soil of the river and removed the silt and cut the weeds, except for the purpose of improving the navigation. This, therefore, is a case for compensation but not for action."

Lord Hatherley, C.'s, comment in *Geddis v. Proprietors of Bann Reservoir*.

In *Geddis v. Proprietors of Bann Reservoir*, Lord Hatherley, C.'s, comment on this case is as follows:² "If a company, in the position of the defendants there, has done nothing but that which the Act authorized—nay, may in a sense be said to have directed—and if the damage which arises therefrom, is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done must either find in the Act of Parliament something which gives him compensation, or he must be content to be deprived of that compensation, because there has been nothing done which is inconsistent with the powers conferred by the Act and with the proper execution of those powers." The principle of law involved is thus put by Lord Blackburn:³ "It is now thoroughly well established that no action will lie for doing that which the Legislature has authorized if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the Legislature has authorized if it be done negligently. And I think that if by a reasonable exercise of the powers either given by statute to the promoters or which they have at common law the damage could be prevented, it is within this rule (negligence) not to make such reasonable exercise of their powers."⁴

Lord Blackburn's statement.

Metropolitan Asylums District v. Hill.

Managers of the Metropolitan Asylums District v. Hill,⁵ also in the House of Lords, raises a similar point. An Act of Parliament authorized the formation of districts and district asylums for the care and cure of sick and infirm poor, but did not by direct and imperative provisions order these things to be done; so that in the event of a nuisance being created there was no statutory protection. It was accordingly held, deciding in conformity with *Jones v. Festiniog Railway Company*, that the rights of private persons were not affected thereby, and that on the occurrence of

a nuisance an injunction might be obtained. "Where the terms *dictum*.

¹ As Bovill, C.J., put this point, L. R. 4 C. P. 629, at 634: "The defendants having powers only for the purpose of improving the navigation, the Act does not vest the soil in them, and the person in whom the soil is vested might complain if they did any act for any other purpose than improving the navigation."

² 3 App. Cas. 430, at 438.

³ 3 App. Cas. at 455.

⁴ See *Harrison v. Southwark and Vauxhall Water Company* (1891), 2 Ch. 409.

⁵ 6 App. Cas. 193, at 213. See *City and South London Railway Company v. London County Council* (1891), 2 Q. B. 513.

of the statute," says Lord Watson, "are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer licence to commit nuisance in any place which might be selected for the purpose."

The other aspect of the principle is illustrated in *London and Brighton Railway Company v. Truman*.¹ A railway company were authorized by their Act to purchase by agreement any lands, not exceeding in the whole fifty acres, in such places as should be deemed eligible for the keeping of cattle carried by their railway. Under this power they bought land and used it as a yard or dock for their cattle traffic. The user was a nuisance to the occupiers of houses near. The House of Lords, reversing the decision of the Courts below, held that the occupiers were not entitled to an injunction. A great point was made of the decision in *Managers of the Metropolitan Asylums District v. Hill* and *dicta* of Lord Watson therein;² but Lord Selborne thus discriminates the case then before the House from the earlier one:³ "In that case the establishment of a small-pox hospital within certain local limits was not specially authorized, as the construction of the London and Brighton Railway, for the purpose (among other things) of the loading, carriage, and unloading of cattle and other animals, was here. If it had been, I do not think that this House would have considered the case of any adjacent land, in a situation not defined, which the Board might have been authorized to purchase by agreement for the enlargement, as they might think desirable, of the hospital premises, different from that of the site of the hospital itself. In that case no use of any land which must necessarily⁴ be a nuisance at common law was authorized; it was not shewn to be impossible that lands might be acquired in such a situation and of such extent as to enable a small-pox hospital (if required by the Poor Law Board) to be erected upon them without being a nuisance to the adjoining land. Here there can be no question that the Legislature has authorized acts to be done for the necessary and ordinary purposes of the railway traffic

London and Brighton Railway Company v. Truman.

Metropolitan Asylums District v. Hill discriminated from *London and Brighton Railway Company v. Truman*, by Lord Selborne in the House of Lords.

¹ 11 App. Cas. 45; *Biscoe v. Great Eastern Railway Company*, L. R. 16 Eq. 636; *Jones v. Stanstead, Shefford, and Chambley Railway Company*, L. R. 4 P. C. 98: as to the effect of this, see *Corporation of Parkdale v. West*, 12 App. Cas. 602, and *North Shore Railway Company v. Pion*, 14 App. Cas. 612, per Lord Selborne, at 627.

² 6 App. Cas. at 212, 213.

³ 11 App. Cas. at 57.

⁴ As to who is judge of necessity, see *Att.-Gen. v. Metropolitan Railway Company* (1894), 1 Q. B. 384, at 390, 399.

(*e.g.*, such as those complained of in *Rex v. Pease*) which would be nuisances at common law, but which, being so authorized, are not actionable. In that case there were no compulsory powers; here there are the compulsory powers usually given to railway companies; and the land in question, though not acquired under those powers, was acquired for purposes expressly authorized, being *ejusdem generis* with those for which the compulsory powers were given, and was to be used in connection with and as subsidiary to the railway and other works executed under those powers. In that case there were no provisions for any compensation for any damage or injury to any persons under any circumstances. Here there are, the line being drawn, as is usual in Railway Acts, between lands taken or injuriously affected by the construction of the works (which are subjects of compensation) and lands which or persons who may suffer some subsequent detriment or annoyance from the authorized use of the railway and works when constructed; so that, if the question had been one of compensation, the respondents would not be within the line. In all these points, as it seems to me, the present case is not similar to, but in direct contrast with, that of *Managers of the Metropolitan Asylums District v. Hill*.¹ In other words, in *Managers of the Metropolitan Asylums District v. Hill*, certain funds were, by Act of Parliament, made applicable to certain works. In *London and Brighton Railway Company v. Truman*,² by the same authority, a defined enterprise was authorized within designated limits. In the one case, mere allocation of funds to an object was determined not to legalize the carrying out of that object anywhere. In the other, the fact of a nuisance arising from the execution of Parliamentary powers was held not to limit the measure of their exercise.³

¹ A small-pox hospital was declared not a noxious or offensive business within sec. 112 of the Public Health Act, 1875, in *Withington District Local Board of Health v. Corporation of Manchester* (1893), 2 Ch. 19.

² See *Rapier v. London Tramways Company* (1893), 2 Ch. 588.

³ In the United States there does not appear to be any legislative provision analogous to The Lands Clauses Act, 1845. The law applicable in the case of legislative powers authorizing the acquisition of land for the carrying on a railway or any similar enterprise is thus stated; "Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies like those in question, confer no license to use them in disregard of the private rights of others and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of rights and powers conferred. . . . The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large." *Baltimore and Potomac Railroad Company v. Fifth Baptist Church*, 108 U.S. (1 Davis), 317, at 331, 332.

To this statement of the law must be added that in *The Queen v. Bradford Navigation Company*,¹ that when statutory powers are conferred in circumstances in which they may be exercised without causing a nuisance, but new and unforeseen circumstances subsequently arise which render the exercise of them impossible without causing one, and so contravening the law of the land, the Legislature is not to be held to authorize a nuisance, and the powers conferred must be exercised, if at all, in conformity to the general law.

The Queen v. Bradford Navigation Company.

In *National Telephone Company v. Baker*,² defendant's authority was derived under a provisional order confirmed by Act of Parliament. Kekewich, J., held that such provisional orders must be treated as "a well-known and recognized class of legislation," equally with the Railway Acts whose effect was interpreted in *London, Brighton, and South Coast Railway Company v. Truman*;³ consequently that the conditions of exercising powers granted in either case are the same.⁴

Provisional Order confirmed by Act of Parliament identical in effect with statutory enactment. National Telephone Company v. Baker.

As to the effects of exceeding a statutory power, the Lord Chancellor, in *Ware v. Regent's Canal Company*,⁵ said: "Where there has been an excess of the powers given by an Act of Parliament, but no injury has been occasioned to any individual, or is imminent and of irreparable consequences, I apprehend that no one but the Attorney-General on behalf of the public has a right to apply to this Court to check the exorbitance of the party in the exercise of the powers confided to him by the Legislature. If an individual has sustained no damage, and there is no reason to apprehend that he will sustain damage, notwithstanding his being nearer to the possible cause of injury than the rest of the public, he has no peculiar position or claim to entitle him to become the redresser of a public grievance, or to complain of the disregard of the provisions of an Act of Parliament. The language of Lord Eldon in *Blakemore v. Glamorganshire Canal Company*⁶ certainly appears to sustain the proposition of the plaintiff to its full extent, but I adopt the interpretation of Lord Eldon's meaning by Alderson, B., in *Lee v. Milner*,⁷ and with him I say 'that

Exceeding statutory powers. Ware v. Regent's Canal Company.

¹ 6 B. & S. 631. Cp. *Att.-Gen. v. Proprietors of the Bradford Canal*, L. R. 2 Eq. 71.

² (1893) 2 Ch. 186.

³ 11 App. Cas. 45, at 53.

⁴ The subject is considered in *Hamilton v. Vicksburg, &c. Railroad Company*, 119 U. S. (12 Davis) 280, where the facts somewhat resemble those in *Hole v. Sittingbourne and Sheerness Railway Company*, 6 H. & N. 488; but where the authority to construct the works was an implication from the other powers given. The governing principle is stated by Shearman and Redfield, *Negligence* (4th ed.), § 282.

⁵ (1858) 3 De G. & J. 212, at 228.

⁶ 1 My. & K. 154, at 162; see per Jessel, M.R., *Taylor v. Corporation of St. Helens*, 6 Ch. Div. 264, at 278.

⁷ 2 Y. & C. (Ex.) 611, at 618.

these Acts of Parliament ought to be treated as conditional powers given by Parliament to take the land of the different proprietors through whose estates the works are to proceed. Each landholder, therefore, has a right to have the powers strictly and literally carried into effect as regards his own lands, and has a right also to require that no variation shall be made to his prejudice in carrying into effect the bargain between the undertakers and any one else.' The words 'to his prejudice' are emphatic, and mean not merely to his possible, but to his actual prejudice."

Considerations applicable in the case of public bodies invested with statutory powers.

To return, however, to the consideration of the special position of corporations or other public bodies; there does not exist any intrinsic distinction between the liability of public bodies invested with statutory powers and that of private persons, apart from peculiarities arising from the powers conferred on such public bodies by the instrument or authority creating them. The liability of a master for the act of his servant is limited by the authority, express or implied, that the servant has from the master. The liability of public bodies is limited in addition by the instrument of their creation; and even in the event of their wishing to ratify some act that is thus *ultra vires*, they are able to do so only in the circumstances we shall subsequently have to consider.

General rule stated by Brett, L.J.

By Day, J.

The general rule of liability of persons or bodies invested with statutory powers is thus expressed by Brett, L.J.:¹ "If people do that which, as against the public, amounts to misdemeanour, and lays them open to an indictment, and if, besides the injury to the public, they so do it as to do an injury to a private individual, that individual may maintain an action for damages for the breach of the statutory enactment which lays them open to an indictment;" and Day, J., in a later case,² thus expresses himself: "The law is plain, that whosoever undertakes the performance of, or is bound to perform, duties—whether they are duties imposed by reason of the possession of property, or by the assumption of an office, or however they may arise—is liable for injuries caused by his negligent discharge of those duties. It matters not whether he makes money or a profit by means of discharging the duties, or whether it be a corporation or an individual who has undertaken to discharge them. It is also immaterial whether the person is guilty of negligence by himself or by his servants. If he elects to perform the duties by his servants, if, in the nature of things, he is obliged to perform the duties by employing

¹ *Glossop v. Heston and Isleworth Local Board*, 12 Ch. Div. 102, at 121.

² *Gilbert v. Corporation of the Trinity House*, 17 Q. B. D. 795, at 799.

servants, he is responsible for their acts in the same way he is responsible for his own."

The liabilities of public bodies may be modified by differences of the duties cast upon them.

The ancient appropriate method of constituting a public body invested with privileges and affected with duties was by charter from the Crown; and from this incident of their creation an extension of their liabilities was deduced; for the grant of this charter was in the nature of a favour, which must be accepted with all its burthens or rejected with all its benefits, "otherwise a corporation might reject the obligation which was imposed and accept the benefit which was conferred upon them."¹ Hence it results that not only are the corporation bound to the Crown to the performance of the duties in consideration of which they receive benefits, but are in addition liable in damages to private persons for their non-performance.² This is laid down in *Mayor, &c. of Lyme Regis v. Henly*,³ where Park, J., delivers the opinion of the judges: "We do not go the length of saying that a stranger can take advantage of an agreement between A and B, nor even of a charter granted by the King, where no matter of general and public concern is involved; but where that is the case, and the King, for the benefit of the public, has made a certain grant imposing certain public duties, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and individuals peculiarly injured by action." From this it has been sought to argue "that a contract made expressly for the benefit of a third person may be enforced by such person so long as the parties thereto have not agreed to rescind it."⁴ Assuming the existence of such

Public bodies, how affected by differences in the mode of their incorporation.

Mayor, &c., of Lyme Regis v. Henly, Park, J.'s, judgment.

¹ *Rex v. Westwood*, 7 Bing, 1, at 92.

² An indictment and an information are the only remedies to which the public can resort for a redress of their grievances in this respect. If an individual has suffered a particular injury, he may recover his loss by an action on the case: Hawk. P. C. bk. 2, ch. 25, 4; 1 Chitty, Cr. Law, 162; 4 Bl. Com. 167, 301. The different effects of nonfeasance and misfeasance are considered in *The Earl of Shrewsbury's case*, 9 Co. Rep. 50 b.

³ 2 C. & F. 331, at 355. As to the American cases on this point, see *Weightman v. Corporation of Washington*, 1 Black (U. S.) 39, at 53.

⁴ Such a principle was enounced in *Dutton v. Poole*, 2 Lev. 210, Vent. 318, 332, and is the basis of a series of American cases, *Lawrence v. Fox*, 20 N. Y. 268; *Van Schaick v. Third Avenue Railroad Company*, 38 N. Y. 346; but was distinctly denied to be law by Lord Langdale, M.R., in *Colyear v. Countess of Mulgrave*, 2 Keen 81, at 98; and by the Court of Queen's Bench, *Tweddle v. Atkinson*, 1 B. & S. 393; "where," says Bowen, L.J., *Gandy v. Gandy* (1885), 30 Ch. D. 57, at 69, "the true common law doctrine has been laid down"; *In re D'Angibau* (1880), 15 Ch. D. 228, at 242; *In re Flavell* (1883), 25 Ch. D. 93. It is competent, nevertheless, to shew that one or both of the nominally contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract to, on the one hand, and to charge with liability on the other, the unnamed principal. *Higgins v. Senior*, 8 M. & W. 834; *Evans v. Hooper*, 1 Q. B. Div. 45. A purchase in the name of another is a trust for the person who pays the consideration, except a purchase by a parent for a child, which is presumed to be an advancement, *Finch*

a principle, it would yet seem both simpler and more accurate to consider the relation as arising from the general position of the Crown as bound to the promotion of the interests of the subjects, and as acting for them in matters where political are intermixed with private considerations, and the subjects as clothed with rights in the matter somewhat analogous to those of a *cestuis que trust*.

Sutton v.
Johnstone.

Ferguson v.
Earl of
Kinnoull.

Lord
Lyndhurst,
C.'s opinion.

Lord
Brougham's.

But the cases have been extended considerably further than this. Thus in *Sutton v. Johnstone*,¹ the plaintiff brought an action for malicious prosecution, and added a count for unreasonably delaying the calling of a court-martial; in reference to which Eyre, B., lays down the proposition that "every breach of a public duty working wrong or loss to another is an injury, and actionable." This *dictum* was approved and adopted in *Ferguson v. Earl of Kinnoull*² by Lord Lyndhurst, C.: "When a person has an important public duty to perform, he is bound to perform that duty; and if he neglects or refuses so to do, and an individual in consequence sustains an injury, that lays the foundation for an action to recover damages by way of compensation for the injury that he has so sustained. My Lords, that was expressly laid down, if it were necessary to cite authority for the purpose, in the case of *Sutton v. Johnstone*,¹ by Mr. Baron Eyre, in delivering the judgment of the Court of Exchequer in that important case; and other authorities might be mentioned to the same effect."³ Lord Brougham's⁴ expression is: "If the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages, as my noble and learned friend has stated, to those whom his refusal or failure injures. . . . Nor are these propositions the less true generally and as the rule because there are exceptions, and a very few exceptions, introduced into the law and constitution of this, and indeed of every, country from the necessities of the case. Thus, the Legislature can, of course, do no wrong; but so [*sic*] its branches are placed beyond all control of the law. And the Courts of Justice

v. Finch, 15 Ves. 43. Compare Moyle, Just. Inst., note to Inst. 3, 19, 3, also 2 Kent, Comm., 464 n (e), and Pollock, Contracts (5th ed.), 200. The whole subject is discussed at length in a note to Comyns's Digest (Hammond's edition), Action upon the Case upon Assumpsit (E. a.), where *Dutton v. Poole* is suggested to rest on a special rule peculiar to agreements made by parents on behalf of their children. See also *Eley v. Positive Government Security Life Assurance Company*, 1 Ex. D. 20, 88.

¹ 1 T. R. 493.

² 9 Cl. & F. 251, at 279, 4 St. Tr. N. S. 785.

³ *Green v. Buckle-churches*, 1 Leon. 323; *Stirling v. Turner* (no reference). *Innes v. Magistrates of Edinburgh*, Morison's Dictionary of Decisions, vol. xxxi. 13, 189.

⁴ 9 Cl. & F. at 289. "In a criminal prosecution or in an action against a justice of the peace or against a clergyman for any offences by either of them committed in their respective situations, every day's practice has settled that the exercise of their offices is as against them proof that they are bound to discharge their respective functions." per Lord Kenyon, C.J., *The King v. Holland*, 5 T. R. 607, at 624.

that is, the superior Courts, Courts of general jurisdiction, are not answerable, either as bodies or by their individual members, for acts done within the limits of their jurisdiction. Even inferior Courts, provided the law has clothed them with judicial functions, are not answerable for errors of judgment; and where they may not act as Judges, but only have a discretion confided to them, an erroneous exercise of that discretion, however plain the miscarriage may be, and however injurious its consequences, they shall not answer for. This follows from the very nature of the thing: it is implied in the nature of judicial authority, and in the nature of discretion where there is no such judicial authority. But where the law neither confers judicial power, nor any discretion at all, but requires certain things to be done, every body, whatever be its name, and whatever other functions of a judicial or of a discretionary nature it may have, is bound to obey; and, with the exception of the Legislature and its branches, every body is liable for the consequences of disobedience; that is, its members are liable through whose failure or contumacy the disobedience has arisen, and the consequent injury to the parties interested in the duty being performed." Lord Cottenham¹ Lord Cottenham's opinion. states the principle: "If there has been a wrong sustained; if that wrong has arisen from the body of which these individuals form a part having refused to do that which the law has stated they are bound to do, and damage has been sustained by an individual in consequence; and if, in such cases, the law be that the individual members of the body are all answerable in their own persons for the damage and injury so sustained, the whole case is exhausted." Lord Campbell adds:² "I conceive that by the law of Scotland, as well as by the law of England, and, I believe, Lord Campbell's opinion. by the law of every civilized country, where damage is sustained by one man from the wrong of another, an action for compensation is given to the injured party against the wrongdoer."

The law thus explicitly laid down by this highest Court must be taken to be definitely established. But there are not wanting indications pointing out a possible different view.

¹ 9 Cl. & F. at 308.

² L. c. at 310. Some remarks of Lord Campbell, at 324, may here be inserted with reference to the defence not infrequently heard of "conscientious disobedience" to a law. "Finally," he says, "we were much pressed with the hardship to which the appellants are exposed, by being held liable to actions for acting according to their consciences. I do not think, my Lords, that where the law is clear the hardship of being obliged to obey it is a topic that can be listened to in a Court of Justice. There can be nothing more dangerous than to allow the obligation to obey a law to depend upon the opinion entertained by individuals of its propriety, that opinion being so liable to be influenced by interest, prejudice, and passion; the love of power still more deceitful than the love of profit; and that most seductive of all delusions, that a man may recommend himself to the Almighty by exercising a stern control over the religious opinions of his fellow men."

American law differs.

In America a distinction is drawn, and well established,¹ between corporations proper, having the powers ordinarily conferred upon local administrative bodies (*e.g.*, respecting streets within their limits), which owe to the public the duty to keep them in a safe condition for use in the usual mode by travellers and are liable in a civil action for special injury resulting from neglect to perform this duty; and quasi-corporations created by the Legislature for purposes of public policy, which, though liable to indictment for omission to perform duties enjoined, are not liable to an action for such neglect unless the action is given by some statute.² Clearly there, then, the principle enunciated must be taken with limitations.³

Wilson v. Mayor, &c. of Halifax.

Wilson v. Mayor, &c. of Halifax,⁴ is an English case which suggests a similar distinction. "Should a case arise," it is there said, "in which the question shall be, whether the 68th section of the Public Health Act, 1848,⁵ imposes upon the local authority the liability to be sued in a civil action for damages, by reason of a failure to perform a duty assigned to them by the Act, we should pause before we could hold that, in addition to the well-established remedy by indictment, every individual among the public would have a right of action for any and every injury resulting from such breach of duty. Upon this point, however, as it does not arise in the present case, we pronounce no opinion."

Hammond v. Vestry of St. Pancras.

On the other hand, in Hammond v. Vestry of St. Pancras,⁶ a case

¹ Hickok v. Trustees of the Village of Plattsburg, reported as a note to Conrad v. Trustees of the Village of Ithaca, 16 N. Y. 158, at 161. The distinction has not gone unquestioned. In Peek v. Village of Batavia, 32 Barb. (N.Y.) 634, Marvin, J., is reported as saying, at 642: "It is not for me to question the soundness of this position. Indeed, when a case arises in which it is in point, I shall of course follow it. But I may be permitted to say, with great respect for the very able and learned judge upon whose reasoning the Court proceeded (Selden, J., in Weet v. Trustees of the Village of Brockport, 16 N. Y. 161 *n.*), that his opinion has failed to satisfy my mind of the correctness of the position." Ehrgott v. New York, 96 N. Y. 264; Cohen v. New York, 113 N. Y. 532; McNally v. Cohoes, 127 N. Y. 350.

² Mower v. Leicester, 9 Mass. 248, at 250. Wilson v. Mayor of New York, 1 Denio (N. Y.) 595. In Barnes v. District of Columbia, 91 U. S. (1 Otto) 540, at 552, it is said, "whether this distinction is based upon sound principle or not, it is so well settled that it cannot be disturbed."

³ As to the historical grounds of the American doctrine, see *post*, 364, note 3.

⁴ L. R. 3 Ex. 114, per Kelly, C.B., at 119.

⁵ The section runs: "Be it enacted that the local board of health *shall*," &c., 11 & 12 Vict. c. 63, repealed 38 & 39 Vict. c. 55, s. 343.

⁶ L. R. 9 C. P. 316, at 321. Meek v. Whitechapel Board of Works, 2 F. & F. 144, is distinguished as involving negligence; if otherwise, is overruled, Lampard v. City Commissioners of Sewers, 1 Times L. R. 114. Fleming v. Mayor and Corporation of Manchester, 44 L. T. 517, is similar in its facts to the case in the text, but the finding of the jury was that if the sewer had been originally properly constructed, it would not have required repair, and would not have burst. Stephen, J., held the corporation liable. The decision was reversed on the ground that there was no evidence of negligence in the construction of the sewer to justify the finding of the jury; see Times Newspaper, 27th June 1882. Humphries v. Cousins, 2 C. P. D. 239, is a case at common law. See also Brown v. Great Western Railway Company, 2 Ont. App. 64, per Hagarty, C.J., at 71.

under section 72 of the Metropolis Local Management Act,¹ 1855, where it was sought to impose a liability for an injury resulting from the disrepair of a sewer, and apart from negligence, Brett, J., said: "Now, if the 72nd section does throw upon the defendants an absolute duty or obligation to guarantee that the sewers shall be at all times cleansed, it follows that, if any injury arises to an individual from their not being so kept, the vestry are liable."² The decision of the Court turned on the fact that no negligence was alleged, and therefore, failing a statutory duty imposed in "the clearest possible terms," there was no liability. It should be noted that the duty imposed on the vestry in this case, by the 72nd section, which the judgment of the Court determines to be a duty to exercise due and reasonable care and not an absolute duty,³ is not enforced by any specific method; and therefore the ordinary common law means of redress are available—indictment, mandamus, or private action by any one specially injured by neglect of the duty.

The rule of liability is enunciated in general terms by Pollock, C.B., in the case of *M'Kinnon v. Penson*⁴—"that where an indictment can be maintained for something done to the general damage of the public, an action on the case can be maintained for a special damage thereby done to an individual, as in the ordinary case of a nuisance in the highway, or by a stranger digging a trench across it, or by the default of the person bound to repair *ratione tenuræ*."

M'Kinnon v. Penson.
Rule stated by Pollock, C.B.

It is obvious from the instances given, and, indeed, from the general language of the proposition, that this rule applies to those cases where a nuisance has been created either by the act of the defendant or from his default in maintaining conditions that have been altered from their original state by the act of the defendant. The case of default in repairing *ratione tenuræ* is also well within the rule in *Henly v. Mayor, &c. of Lyme*.⁵ An example of those cases of frequent occurrence where default in maintaining conditions that have been altered from their original state by the act or under the title of the defendant, and where

Applies to cases where nuisance has been created either by act of defendant or default in maintaining conditions he is liable for producing.

¹ 18 & 19 Vict. c. 120.

² In *Glossop v. Heston and Isleworth Local Board*, 12 Ch. Div. 102, at 120, Brett, L.J., said: "The defendants having done no act, it seems to me the Court of Chancery has never, without some act done by such a body as this, granted what is called a mandatory injunction against a public body in order to force them merely to enter upon and to do their duty. There was a long list of cases cited to us the other day; I watched them carefully, and there was not one of them in which the defendant had not done an act which had caused an injury to a private individual, and which act was unjustified by any statute, and which was such an act as, if done by a private individual, would have given a cause of action at law."

³ Cp. *Bateman v. Poplar District Board of Works* (No. 2), 37 Ch. D. 272.

⁴ 8 Ex. 319, at 327, affd. 9 Ex. 609.

⁵ 5 Bing. 91, in H. of L. 1 Bing. N. C. 222, 2 Cl. & F. 331.

Jolliffe v.
Wallasey
Local Board.

the damage really arises from a positive act imperfectly carried out, and not from an omission to act, is the omission complained of in *Jolliffe v. Wallasey Local Board*; ¹ which was “not placing a buoy of sufficient size and dimensions over the anchor to resist the current of the ebb and flow of the tides so as properly and efficiently to indicate the position of the anchor.” The omission charged was a failure to complete or to maintain work that the board had undertaken—not an omission to undertake work to which they were obliged by statute, except in the sense that all shortcomings in enjoined work can be termed “omissions.”

White v.
Hindley Local
Board.

White v. Hindley Local Board ² is to the same effect. A grid was placed over the opening of a sewer to prevent the hole being dangerous to those using the road, and also to prevent stones passing into the sewer. The grid was defective through want of repair, and the horse of the plaintiff was injured. The Court held that the defendants were liable, “at all events in their capacity of owners of the sewers,” even if there was an exception to their liability as surveyors of highways. ³

Borough of
Bathurst v.
Macpherson.

Borough of Bathurst v. Macpherson, ⁴ before the Judicial Committee of the Privy Council, though containing expressions capable of

¹ L. R. 9 C. P. 62.

² L. R. 10 Q. B. 219; *Blackmore v. Vestry of Mile End Old Town*, 9 Q. B. D. 451, where a water meter was placed in an iron box in the footway, the top of which wore smooth; *Smith v. West Derby Local Board*, 3 C. P. D. 423; *Kent v. Worthing Local Board* (1882), 10 Q. B. D. 118. This last case was reflected on in *Moore v. Lambeth Waterworks Company* (1886), 17 Q. B. Div. 463, where it was held that a fire-plug lawfully fixed in the highway, and in good condition, becoming dangerous through defect in the condition of the surrounding pavement, did not give a cause of action against the water company on an accident occurring. The Master of the Rolls suggested a possible distinction between Moore's case and that of the Worthing Local Board to be that in the latter the same authority had control over the highway and over the valve cover; but in the subsequent case of *East London Waterworks Company v. Vestry of St. Matthew, Bethnal Green*, on *Kent v. Worthing Local Board* being cited in argument, the Master of the Rolls observed: “We overruled that case the other day” (*ex mea relatione*). In *Thompson v. Mayor of Brighton*; *Oliver v. Local Board of Horsham* (1894), 1 Q. B. 332, *Kent v. Worthing Local Board*, was in terms overruled, and the law is now settled beyond dispute that where a local authority exercise two sets of powers, *e.g.*, are gas or water or sewer authority, and at the same time highway authority—the merely allowing the road to wear away round covers placed there in execution of their powers as gas or water or sewer authority, so that a projection above the surface of the road is produced is no more than an omission to repair the highway by a highway authority for which no action lies. See *The Queen v. Mayor, &c., of Poole*, 19 Q. B. D. 602; as to the authority of this case on the preliminary point taken in it, see the curious note at 683; as to its authority on the other point, see *The Queen v. Mayor, &c., of Wakefield*, 20 Q. B. D. 810; *Strube v. Southwark and Vauxhall Railway Company*, 5 Times L. R. 638. In *Stockings v. Lambeth Waterworks Company*, 7 Times L. R. 460 (C. A.), plaintiff recovered against a water company for negligence in placing plugholes in a footway. *Steele v. Mayor of Essendon*, 17 Vict. L. R. 239, contains a discussion on the cases. In *Steele v. Dartford Local Board*, 60 L. J. Q. B. 256, the owner of cottages was required to connect the drains of the cottages with the sewer, and having complied with this requirement, a hole in the road, made for the purpose of the work, was filled in imperfectly, and the road subsided, causing injury to the plaintiff, who sued the Board who were held not liable.

³ *Cox v. Vestry of Paddington*, 64 L. T. 566, where an old and rusty pipe, known to defendants' surveyor, was allowed to remain in the ground.

⁴ 4 App. Cas. 256.

wider meaning,¹ does not necessarily involve any wider principle. The damage for which plaintiff sued was caused by an artificial work, viz., a barrel drain, without the construction of which the accident would not have occurred, nor yet if it had been kept in repair. The question was whether the defendants were bound to keep in repair this drain, which they had made. The judgment states:² “Their Lordships are therefore of opinion Judgment. that the appellants, by reason of the construction of the drain, and their neglect to repair it, whereby the dangerous hole was formed, which was left open and unfenced, caused a nuisance in the highway, for which they were liable to an indictment. This being so, their Lordships are of opinion that the corporation are also liable to an action at the suit of any person who sustained a direct and particular damage from their breach of duty.” But the default of the defendants was not “keeping the drain they had made in repair.” They had made a hole, and neglected to prevent its becoming dangerous, and the necessary decision of the case is thus expressed: “Their Lordships are of opinion that, under these circumstances, the duty was cast upon them of keeping the artificial work, which they had created, in such a state as to prevent it causing a danger to passengers on the highway which, but for such artificial construction, would not have existed.”³ Thus in this case there was an omission supervening on an act, not a mere omission to act.

In the subsequent case of *Municipality of Pictou v. Geldert*⁴ in the Privy Council, *Borough of Bathurst v. Macpherson* was shewn to be the basis of a series of Colonial decisions proceeding on a theory that the decision in *Russell v. The Men of Devon*⁵ was due merely to the technical difficulty of suing a county; and that when this difficulty was removed by the constitution of some *quasi* corporation or some public officer who might be sued, the old immunity for acts of nonfeasance ceased, and a liability was imposed. Their Lordships emphatically repudiated such a construction: “Whatever general views are stated in that case, must, as in all cases, be taken with reference to the facts. And it is clear to their Lordships that the governing fact in the Bathurst

Municipality of Pictou v. Geldert.

¹ 4 App. Cas. at 267, their Lordships are of opinion that the appellants “were liable to an indictment.” “This being so, their Lordships are of opinion that the corporation are also liable to an action at the suit of any person who sustained a direct and particular damage from their breach of duty”; and again, “in their Lordships’ opinion, there is no principle upon which a distinction in this respect between nonfeasance and misfeasance can be supported.”

² 4 App. Cas. at 267.

³ At 265.

⁴ (1893) App. Cas. 524, at 529. There were present Lord Herschell, C., Lord Watson, Lord Halsbury, Lord Hobhouse, Lord Macnaghten, Lord Morris, Lord Shand, and Sir Richard Couch.

⁵ 2 T. R. 667.

Case is that the conduct complained of was not in the view of the Committee nonfeasance but misfeasance. In delivering the judgment of the Committee, Sir Barnes Peacock expressly says that they do not decide whether the Legislature threw upon the municipality the obligation of keeping in good repair the works it took over. The ground of the decision was that the municipality having, under the powers conferred upon them, constructed a drain which, unless kept in proper condition, would cause a nuisance to the highway, were bound to keep this artificial work in such a condition that no nuisance should be caused, and that, if, owing to their failure to do this, the highway subsided and a nuisance was created, they were as much liable for a misfeasance as if they had by their direct act made the hole in the road which constituted a nuisance to the highway."

Steel v. Mayor
of Essendon.

Steel v. Mayor of Essendon,¹ in which Bathurst v. Macpherson was much cited, does not seem to be a well considered case. A fence was erected to protect a dangerous place. It was admitted there was no duty on the municipality to erect it. The fence having worn away, some one fell into the place it used to protect and was injured. The Victorian Court held that though the defendants were not bound to put a fence, having done so, they were bound to keep it in repair. This may well be if the accident occurred through ill-founded reliance on the fence; if, for example, any one, trusting to its being there, was misled to his injury by its unsafe condition. The accident in question seems rather to have been attributable to the absence of the fence, and not to any ill-founded reliance on the fence. If this were so, it is very difficult to justify the decision, which indeed is then contrary to Woodley v. the Metropolitan District Railway Company.²

What was
decided by
Hartnall v.
Ryde Com-
missioners.

Hartnall v. Ryde Commissioners³ was cited in Borough of Bathurst v. Macpherson. Brett, L.J.,⁴ however, says it "was an exceptional case"; yet it was recognized as an authority in Ohrby v. Ryde Commissioners,⁵ where Mellor, J., having arrived at the conclusion that the omission sued on was one in which there was no absolute discretion to act or not but an absolute duty upon them to act, proceeds: "And if that be the true construction of

¹ 17 Vict. L. R. 239.

² See 2 Ex. Div. 384, especially the last sentence at 387. The decision may possibly be upheld on grounds special to the laws of Victoria, *e.g.*, Higinbotham, C.J., says at 242: "The erection of the fence constituted a taking over of that part of the road on which the fence stood, and was in fact an act connected with the making of that part of the road." But this is not good English law, *Thompson v. Mayor, &c., of Brighton* (1894), 1 Q. B. 334.

³ 4 B. & S. 361.

⁴ *Glossop v. Heston and Isleworth Local Board*, 12 Ch. Div. 102, at 121.

⁵ 5 B. & S. 743. See, however, per Lord Halsbury, C., *Cowley v. Newmarket Local Board* (1892), App. Cas. 345, at 350.

the section, the record discloses a case of actual negligence and breach of duty on the part of the defendants themselves, and we think that under such circumstances we are bound by the decision of this Court in *Hartnall v. Ryde Commissioners* upon the construction of another section of this very statute, but which is exactly in point as to this objection. If that authority is to be questioned, it must be in a court of error, as we are bound by it."

When Mellor, J., gave his judgment in this case, the *dictum* of Lord Campbell, in *Couch v. Steel*, was still accepted as correctly expressing the law; since, however, the strong expressions of Lord Cairns in *Atkinson v. The Newcastle and Gateshead Waterworks Company*¹ have exploded the notion that the mere fact of the breach of a public statutory duty, causing damage to some private person, gives that person a right of action in respect of the breach, Mellor, J.'s, conclusion no longer follows; for admitting that the public commissioners, the defendants in the case, had an absolute duty to place fences by the footways for the protection of foot passengers (which was the duty they were charged with violating), their neglect to perform this statutory obligation did not necessarily imply an actionable wrong to an individual foot passenger.

Once more, in *Cowley v. Newmarket Local Board*,² it was held settled law that a transfer to a public corporation of the obligation to repair does not of itself render the corporation liable to an action in respect of mere nonfeasance. To establish this liability it must be shewn that the Legislature has used language indicating an intention that liability shall be imposed. The Privy Council in *Sanitary Commissioners of Gibraltar v. Orfila*³ had previously expressed the rule thus: "In the case of mere nonfeasance no claim for reparation will lie except at the instance of a person who can shew that the statute or ordinance under which they act imposed upon the Commissioners a duty toward himself which they negligently failed to perform." In fine, the statute incorporating the municipality or conferring the powers in question, must clearly indicate intention on the part of the Legislature that a person injured by mere non-repair of road or bridge should be entitled to sue in respect of damages received therefrom before any liability can arise in law.

In *Gibson v. Mayor of Preston*,⁴ Hannen, J., indicated the limitation on *Hartnall v. Ryde Commissioners* by pointing out that

¹ 2 Ex. Div. 441.

² (1892) App. Cas. 345.

³ 15 App. Cas. 400, at 411.

⁴ (1870) L. R. 5 Q. B. 218, at 221. *Hartnall v. Commissioners of Ryde* was also distinguished in *Parsons v. Vestry of St. Matthew, Bethnal Green*, L. R. 3 C. P. 56.

applicable, the point would have been raised whether the duty imposed is not a "public object,"¹ for breach of which a "public penalty"² is imposed, excluding a right of private action. That this is so seems to be the correct view.

Public Health
(London) Act,
1891, s. 30.

By the section³ it is the duty of every sanitary authority to secure the due removal at proper periods of house refuse from premises, and to comply with a written notice from the occupier of any premises in their district within forty-eight hours after the service. Sub-sec. 2 enacts that "If a sanitary authority fail without reasonable cause to comply with this section they shall be liable to a fine not exceeding twenty pounds." This penalty only came into operation after the action was brought, and so did not apply in the case actually before the court.

Eyre, B.'s,
proposition,
how limited.

The proposition of Eyre, B.,⁴ that "every breach of a public duty working wrong or loss to another is an injury and actionable" is therefore to be limited to the cases of breach of a duty at common law and of breach of a statutory duty where there is no penalty or procedure enjoined by the statute creating the duty.

Exception in
the case of
highways and
bridges.

The liability to repair in the case of highways and bridges is an exception from the general law calling for notice. At common law the remedy for want of repair in highways and bridges was not by suit against the surveyor or justices, but by presentment or indictment against the county, or against some individuals thereof for and in the name of all the rest.⁵

Russell v. Men
of Devon.

In 1788 the case of *Russell v. Men of Devon*⁶ was decided. This is the starting point of the distinctive English law of liability for the non-repair of highways.⁷ It was there laid down that no action will lie by an individual against the inhabitants of a county for an injury sustained in consequence of a county bridge being out of repair. It was urged that the action ought to be maintainable by analogy to the statutes of hue and cry; and

¹ See per Lord Cairns, C., 2 Ex. Div. 441, at 445.

² L. c. at 446.

³ 54 & 55 Vict. c. 76, s. 30.

⁴ *Ante*, 350. *Sutton v. Johnstone*, 1 T. R. 493; *Ferguson v. Earl of Kinnoull*, 9 Cl. & F. 251; 4 St. Tr. N. S. 785.

⁵ 2 Co. Inst. 701; *Rex v. Men of Huntingdon*, Popham, 192; 13 Co. Rep. 33; *re Langforth Bridge*, Cro. Car. 365; Com. Dig. 33 Chimin (B3); *Rex v. West Riding*, 2 Wm. Bl. 685; *Rex v. Middlesex*, Andrew's K.B. (1738), 101, 285.

⁶ 2 T. R. 667; *Thomas v. Sorrell*, Vaugh. 330, 340.

⁷ By this statement must not be understood that any new principle of law was enunciated, for so far back as in Charles II.'s time, Vaughan, C.J., lays down in *Thomas v. Sorrell*, Vaugh. 330, at 340: "If a man have particular damage by a foundrous way, he is generally without remedy, though the nuisance is to be punished by the King. The reason is, because a foundrous way, a decay'd bridge, or the like, are commonly to be repaired by some township, vill, hamlet, or a county who are not corporate. and therefore no action lyes against them for a particular damage, but their neglects are to be presented and they punish'd by fine to the King." *Russell v. The Men of Devon* is the leading case in modern law, and not the first assertion of the principle established by it.

the statute of Winton¹ was specially insisted on, as shewing that an action lies against the inhabitants of a hundred for failing to apprehend felon committing robberies therein. Lord Kenyon, C.J., however, retorted the argument: "The reason of the statute of Winton was this; as the hundred were bound to keep watch and ward, it was supposed that those irregularities which led to robbery must have happened by their neglect. But it was never imagined that the hundred could have been compelled to make satisfaction² till the statute gave the remedy; and most undoubtedly no such action could have been maintained against them before that time. Therefore, when the case called for a remedy, the Legislature interposed; but they only gave the remedy in that particular case, and did not give it in any other case in which the neglect of the hundred had produced any injury to individuals."

Lord Kenyon's reasoning.

There were, therefore, two grounds for the decision—one, the technical one that the inhabitants of a county as such cannot be sued; the other, that, since at common law there is no liability on the part of the whole of the inhabitants of a county to any individual sustaining injury through their inaction, the mere incorporation of them will not avail to give the action without the remedy being definitely conferred by statute.

Grounds for the decision.

Sir Barnes Peacock, accordingly, in *Borough of Bathurst v. Macpherson*,³ fails to give an accurate impression of the law when he says: "The principal objection to the maintenance of the action was that the inhabitants of the county or parish, as the case might be, were not a corporation capable of being sued as such." That, indeed, was an insuperable objection. Still, as Lord Kenyon points out: "Even if we could exercise a legislative discretion in this case, there would be great reason for not giving this remedy"; for the remedy would be a very inconvenient one, and liable to great abuses.⁴ In the words of Ashhurst, J.: "There is another general principle of law which is more applicable to this case, that it is better that an individual should sustain an injury than that the public should suffer an inconvenience."⁵ If,

Sir Barnes Peacock in *Borough of Bathurst v. Macpherson*.

¹ 13 Ed. I. c. 2; Com. Dig. Hundred (C2). Cp. 29 Car. II. c. 7, s. 5.

² *Jackson v. Inhabitants of Calesworth*, 1 T. R. 71; *Wittam v. Hill*, 2 Wils. (K. B.) 92.

³ 4 App. Cas. 256.

⁴ In Scotland it is alleged to have been determined so early as 1798 that the corporation of a royal burgh is under the liability to keep the public streets of the burgh free from dangerous obstructions; *Innes v. Magistrates of Edinburgh*, 31 Mor. Dict. Dec. vol. xxxi. 13,189; *Dargie v. Magistrates, &c., of Forfar* (1855), 17 Dunlop 730, Hayt, *Decisions on Liability for Accidents and Negligence*, but see Lord Lyndhurst, C.'s account of *Innes v. The Magistrates of Edinburgh* in *Ferguson v. Kinnoull*, 4 St. Tr. N. S. 785, at 807, where he finds the principle asserted in the case "applicable both to the law of England and to the law of Scotland; it is a general principle." A reference to the case will establish the justice of this view.

⁵ 2 T. R. 667, at 673.

then, the preliminary and technical objection were out of the way, the objection formulated by Willes, J., in *Parsons v. St. Matthew, Bethnal Green*,¹ and pointed to by Lord Kenyon, C.J., in Russell's case, would hold good against giving "to every one who may meet with any accident from an imperfection in the road a right of action which he never previously possessed, and thus open a wide door to continual litigation."

The Highway
Act, 1835.

In 1835, the Highway Act of that year² was passed,³ providing that the surveyor shall repair, and keep in repair, the several highways in the parish; in default he is liable to a penalty of £5, and he shall, on the justices viewing the road, or causing it to be viewed, put it in repair to their satisfaction.

M'Kinnon v.
Penson.

M'Kinnon v. Penson,⁴ raised the question of liability of the county surveyor for neglecting to repair a bridge under the statute 43 Geo. III. c. 59, which provided that the inhabitants of counties "shall and may sue and for any damage done to bridges and other works," and "shall and may be sued in the name of such surveyor"; but the Court decided that there was no manifested intention in the statute to constitute a new liability in counties to actions to which they were not liable by common law. Had this been intended, "the obvious course would have been to recite the grievance, and provide for the remedy in express terms."

Young v.
Davis.

Next came *Young v. Davis*,⁵ where the question was whether, under the Highway Act, 1835,⁶ a surveyor of highways was liable to an action simply because a road is out of repair. The Court thought the case had been substantially decided by *M'Kinnon v. Penson*, and also that the Act of Parliament appeared not to have been passed for the purpose of creating a new liability, but simply in order to provide machinery whereby the existing duty of the parish to repair might be conveniently fulfilled.

The Metro-
polis Local
Management
Act, 1855.

The Metropolis Local Management Act, 1855,⁷ was alleged to

¹ L. R. 3 C. P. 56, at 60. Cp. Bro. Abr. Accion sur le Case, pl. 93, referring to Y. B. 5 E. iv. 2 pl. 24, the case of the miring of a horse through want of repair of a highway, where the substantial, and not the technical, reason is given, *en quel case nul home singuler avera accion de case, mes ceo est action per voy deprementment*. See, however, *M'Kinnon v. Penson*, per Pollock, C.B., 8 Ex. 319, at 327, and on the other hand per Coleridge, J., delivering the judgment of the Ex. Ch. 9 Ex. 609, at 613, and per Hannen, J., *Gibson v. Mayor of Preston*, L. R. 5 Q. B. 218, at 222; and Lord Herschell, *Cowley v. Newmarket Local Board* (1892), App. Cas. 345-353.

² 5 & 6 Will. IV. c. 50.

³ By sec. 1, 13 Geo. III. c. 78, which collected all the former laws on highways, was repealed.

⁴ (1853) 8 Ex. 319; 9 Ex. 609.

⁵ 7 H. & N. 760, 2 H. & C. 197.

⁶ 5 & 6 Will. IV. c. 50.

⁷ 18 & 19 Vict. s. 120.

have effected an alteration in the metropolis, in the liability to private action for want of repair to highways, by placing the exclusive right to repair them in the vestries as constituted under that Act, and thereby exonerating the parish from all concern in their repair. This was argued in *Parsons v. St. Matthew, Bethnal Green*,¹ where it was resolved that while section 96 of the Act transfers to the vestries in the metropolis the duties and liabilities of the surveyor of highways, it imposes on them no greater liabilities than those to which the surveyor of highways had been previously subject.²

Once more, in *Gibson v. Mayor of Preston*³ it was contended that the Public Health Act, 1848,⁴ s. 68, which vested highways in the local boards of health, thereby rendered them liable to action for injuries caused by non-repair of a highway. Hannen, J.,⁵ delivered the judgment of the Court: "The enactment that the streets shall 'vest in' the local board, whatever meaning may be assigned to that expression, does not seem to us to enlarge the liability resulting from the following words, that they shall be 'under the management and control of the local board'—language similar to that used in the statute under consideration in *Rex v. St. George, Hanover Square*,⁶ where it was held, that the imposing of the duty of repairing on a person or body other than the parish did not, by implication, exempt the parish from liability to indictment; and while this liability remains, the cases above referred to, *Young v. Davis*⁷ and *Parsons v. St. Matthew, Bethnal Green*,⁸ established that no right of action is created against those to whom the management and control of the roads is given."

Gibson v. Mayor of Preston.

No different powers seem to have been conferred by the Public Health Act, 1875;⁹ under which it has been held that there is nothing to make the urban sanitary authority liable to a common law indictment for neglecting those duties which they have imposed on them either as surveyors of the highway or as inhabitants in vestries assembled.¹⁰ The conclusion may be thus stated:

Effect of the Public Health Act, 1875.

¹ L. R. 3 C. P. 56. See *Taylor v. Vestry of St. Mary Abbots, Kensington*, 2 Times L. R. 668.

² The case was also decided on the words of the 98th section, by which "it shall be lawful for every vestry," from which the Court held that it would appear that it was intended to give them a discretion whether to repair the streets or not.

³ L. R. 5 Q. B. 218.

⁴ 11 & 12 Vict. c. 63, rep. 38 & 39 Vict. c. 55.

⁵ L. R. 5 Q. B. at 223. "After careful attention to the arguments which have been addressed to your Lordships, I adhere to the judgment given in the case of *Gibson v. Mayor of Preston*," per Lord Hannen, *Cowley v. Newmarket Local Board* (1892), App. Cas. 345, at 355.

⁶ 3 Camp. 222.

⁷ 7 H. & N. 760, 2 H. & C. 197.

⁸ L. R. 3 C. P. 56.

⁹ 38 & 39 Vict. c. 55, s. 144.

¹⁰ Per Lord Coleridge, *The Queen v. Mayor, &c., of Poole*, 19 Q. B. D. 602, at 609. See, however, *The Queen v. Wakefield*, 20 Q. B. D. 810. "The Act of Parliament contemplates that the duty formerly belonging to the parish still remains in them, and that the surveyor acts strictly as their officer": per Pollock, C.B., *Young v. Davis*,

By common law no action could be maintained for an injury arising from the non-repair of a highway by the parish, and the Legislature has not interfered by any general enactment to give a remedy by action to persons sustaining such an injury. It is therefore incumbent on a plaintiff, who seeks to establish that such a right is exceptionally given to persons sustaining an injury in a particular district, to shew distinctly that the Legislature had such an intention in passing the enactment to which such an effect is attributed.¹ Thus a further exception is grafted on the principle laid down by Eyre, B., in *Sutton v. Johnstone*, and approved by the House of Lords in *Ferguson v. Earl of Kinnoull*,² "that every breach of a public duty working wrong or loss to another is an injury, and actionable."³

¹ H. & N. 760, at 772. The Chief Baron adds: "In my opinion judges ought to consider the consequences of their decisions as regards a multiplicity of actions; and not decide so as to open an endless flood of litigation."

² Per Hannen, J., *Gibson v. Mayor of Preston*, L. R. 5 Q. B. 218, at 222.

³ 9 Cl. & F. 251, 4 St. Tr. N. S. 785.

³ The judgment of Gray, C.J., in *Hill v. City of Boston*, 122 Mass. 344-381, contains an exhaustive examination of the English cases from the Year-books down to *Winch v. Conservators of the Thames*, L. R. 9 C. P. 378. Gray, C.J., thus expresses himself (at 369): "The result of the English authorities is, that when a duty is imposed upon a municipal corporation for the benefit of the public, without any consideration or emolument received by the corporation, it is only where the duty is a new one, and is such as is ordinarily performed by trading corporations, that an intention to give a private action for a neglect of its performance is to be presumed." The reference to trading corporations is to cases like *Scott v. Mayor, &c., of Manchester*, 1 H. & N. 59, 2 H. & N. 204, *Cowley v. Mayor, &c., of Sunderland*, 6 H. & N. 565. The doctrine of the Massachusetts Courts is thus stated (at 380): "However it may be where the duty in question is imposed by the charter itself, the examination of the authorities confirms us in the conclusion that a duty which is imposed upon an incorporated city, not by the terms of its charter, nor for the profit of the corporation, pecuniarily or otherwise, but upon the city as the representative and agent of the public, and for the public benefit, and by a general law applicable to all cities and towns in the Commonwealth, and a breach of which, in the case of a town, would give no right of private action, is a duty owing to the public alone, and a breach thereof by a city, as by a town, is to be redressed by prosecution in behalf of the public, and will not support an action by an individual, even if he sustains special damage thereby." *Tindley v. City of Salem*, 137 Mass. 171. There has been a great conflict of opinion in the United States as to the true doctrine. The view upheld in Massachusetts is based on the authority of *Russell v. Men of Devon*, 2 T. R. 667. The deduction from what is said in that case being, that at common law there is no action against a municipal corporation for failure to repair a highway. All the case actually says, however, is that no action can be brought against the public; and the subsequent English cases merely affirm that the statutes dealing with the liabilities with respect to highways, have no more than transferred the liabilities of the county to the boards created by those statutes, and have not imposed any more onerous obligation on them. The state courts, which have adopted the view taken in Massachusetts, have followed the English construction of statutes dealing with the common law liability, in respect of highways, or, rather, have arrived at the special conclusion of the English cases by the aid of a more general principle; viz., that a duty imposed on public bodies "as the representative and agent of the public" is a duty not enforced by action. On the other hand, the Supreme Court of the United States, and many of the foremost states, as New York and Pennsylvania, adopt the rule that an action of negligence can always be brought against a chartered municipality for neglect to keep streets, over which it has control, in a reasonably fit condition for use: *District of Columbia v. Woodbury*, 136 U. S. (29 Davis) 450. The ground of this is, that a duty arises to the public, from the nature of powers granted to the municipal corporations on their incorporation, to keep the highways, in their jurisdiction, in a reasonably safe condition for ordinary uses, and a corresponding liability rests on them to respond in damages to those injured by a neglect to perform those duties which are held "municipal or ministerial and not governmental."

The principle of non-liability for mere neglect to repair was also applied to criminal proceedings in the case of *Reg. v. Pocock*,¹ where trustees under a local Act were charged with manslaughter on a coroner's inquisition, which set out that they did "feloniously" neglect to repair, or contract for the reparation, of a certain road, whereby it became ruinous, and a man driving along the road was killed. The inquisition was removed by *certiorari* into the Queen's Bench, and quashed, Lord Campbell saying: "No doubt the neglect of a personal duty, when death ensues as the consequence of such neglect, renders the party guilty of it liable to an indictment for manslaughter; and the cases which have been cited in the course of the argument, and which establish that doctrine are good law." "But how can the principle I have stated apply to the present case? It cannot be said that the trustees are guilty of felony in neglecting to contract. Not only must the neglect, to make the party guilty of it liable to the charge of felony, be personal, but the death must be the immediate result of that personal neglect. According to the argument here, it might be said that where the inhabitants generally are bound to repair, and a death is caused, as in the present case, all the inhabitants are indictable for manslaughter."

Non-liability
for neglect to
repair in
criminal
proceedings.

The case of breach of a statutory duty, where there is a penalty or procedure enjoined by the statute creating the duty, remains to be considered.²

Kelly, C.B., in *Atkinson v. Newcastle and Gateshead Waterworks Company*, in the Court of Exchequer, speaking of the judgment of Lord Campbell in *Couch v. Steel*, is reported as saying that it "really comprises the whole law on the subject" of the right of action by a private person specially injured by breach of an Act imposing a duty, and where there is a penalty for the non-performance of the duty. The passage he cites is as follows:³ "The general rule is that 'whenever a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages': Com. Dig. tit. Action on the Case, A. The Statute of Westminster 2 [13 Edw. 1], c. 50, gives a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute: see 2 Inst. p. 486, and in Com. Dig. tit. Action upon Statute, F, it is laid down that 'in every case where a statute enacts or prohibits a thing for the benefit

Atkinson v.
Newcastle and
Gateshead
Waterworks
Company.

Judgment of
Lord Camp-
bell in *Couch*
v. Steel.

¹ 17 Q. B. 34.

² Where a special remedy is pointed out, which it is impossible to resort to, then the right given may be enforced by ordinary action, *Bentley v. Manchester, Sheffield, and Lincolnshire Railway Company* (1891), 3 Ch. 222.

³ L. R. 6 Ex. 404, at 408.

of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' The law thus laid down does not conclude the question of whether there is a right to sue for a mere omission to exercise a statutory duty to the State when the omission works a special injury to the person seeking to sue; since the general rule laid down is no more than that when one is injured by the act of another from whom a duty is owing—otherwise there is no wrong—he has a right of action. And the interpretation in *Comyns of the Statute of Westminster 2* [13 Edw. 1], c. 50, contains the saving clause that the statute must enact or prohibit a thing 'for the benefit of a person.'"

Considered.

The judgment of Lord Campbell in *Couch v. Steel*¹ may be read as deciding that 7 & 8 Vict. c. 112, s. 18, created a duty to individuals enforceable by action, as well as imposed a penalty for non-performance which might be recovered by an informer. Lord Campbell says:² "As far as the *public* wrong is concerned, there is no remedy but that prescribed by the Act of Parliament. There is, however, beyond the public wrong, a special and particular damage sustained by the plaintiff, by reason of the breach of duty by the defendant, for which he has no remedy unless an action on the case at his suit be maintainable; and the question is, whether the penalty annexed to the offence concludes the plaintiff, who has sustained a special and particular damage, as well as the public, though no part of the penalty is payable to him." Lord Campbell's view (adopted by the Court) is that, first, the Act was passed for the benefit of individuals; secondly, that, such being the case, individuals injured should have a means of enforcing the duty towards them; thirdly, that as, apart from the penalty given to the informer (who is not necessarily the injured person), no means were provided by the Act for obtaining compensation, the common law right to maintain an action in respect of a special damage resulting from the breach of a statutory duty is not taken away by reason of a penalty recoverable by a common informer being annexed as a punishment for the non-performance of the public duty.

Approved by
Kelly, C.B.,
and Bramwell
and Cleasby,
BB., in
Atkinson v.
Newcastle and

These propositions were approved by Kelly, C.B., and Bramwell and Cleasby, BB. (Martin, B., not assenting), in the Court of Exchequer, in *Atkinson v. Newcastle and Gateshead Waterworks*,³ but all three of them were doubted in the Court of Appeal,

¹ 3 E. & B. 402; *Great Northern Steamship Fishing Company v. Edgehill*, 11 Q. B. D. 225.

² 3 E. & B. at 412.

³ L. R. 6 Ex. 404.

where the decision of the Court of Exchequer was reversed.¹ As to the first, Lord Cairns, C., said :² “ With regard to that case, and the effect of that particular Act, I will say this, that if the matter were brought before this Court for review I should like to take time to consider whether, with reference to that particular Act, that case was rightly decided.” As to the second, Lord Cairns, C., said : “ I must venture, with great respect to the learned judges who decided that case [*Couch v. Steel*], and particularly to Lord Campbell, to express grave doubts whether the authorities cited by Lord Campbell justify the broad general proposition that appears to have been there laid down,—that, wherever a statutory duty is created, any person, who can shew that he has sustained injuries from the non-performance of that duty, can bring an action for damages against the person on whom the duty is imposed.” As to the third, Brett, L.J., said :³ “ I entertain the strongest doubt whether the broad rule there enunciated can be maintained, the rule, that is to say, that where a new duty is created by statute, and a penalty is imposed for its breach, which penalty is to go to the person injured by such breach, the penalty, however small and inadequate a compensation it may be, is in such a case to be regarded as indicating an intention on the part of the Legislature that there should be no action by such person for damages, but that, where a similar duty is created, and a similar penalty imposed which is not to go to the person injured, then the intention is that he is to have a right of action. I don’t think that proposition can be supported.” Lord Cairns’s view on this point was :⁴ “ There being here in a certain number of cases, a penalty which the plaintiff himself admits excludes the right of action, the conclusion is irresistible that in the remaining cases also in the same section the Legislature intended to give no right of action.”

Gateshead Waterworks; but not approved by the Court of Appeal in the same case.

Lord Herschell, in *Cowley v. Newmarket Local Board*,⁵ referring to the same proposition and the comments on it by the judges in the Court of Appeal in *Atkinson’s* case, says : “ I share the doubt expressed by these learned judges, and the opinion expressed by Lord Cairns, that much must ‘ depend on the purview

Lord Herschell’s opinion.

¹ 2 Ex. Div. 441 ; Com. Dig. Action upon Statute. In the *Queen v. Hall* (1891), 1 Q. B. 747, the cases upon the remedy available where a statutory offence has been created, and a statutory penalty attached thereto, are lengthily considered and classified. See also *Vallance v. Falle*, 13 Q. B. D. 109 ; *Ross v. Rugge Price*, 1 Ex. D. 269. In *Smith v. Philadelphia*, 81 Pa. St. 38, it was laid down that the introduction of water by a city corporation into private houses is not on the footing of a contract, but of a licence which is paid for. As to the effect of a statutory remedy taking away a common law right of action in America, see *Hayes v. Michigan Central Railroad Company*, 111 U. S. (4 Davis) 228, at 239.

² 2 Ex. Div. 441, at 447, 448.

⁴ 2 Ex. D. at 447.

⁵ (1892) App. Cas. 345, at 352.

³ L. c. at 449.

of the Legislature in the particular statute and the language which they have there employed.'"

Rule discussed. The actual decision in *Atkinson v. Newcastle and Gateshead Waterworks* is no more than that there may be circumstances (as where a penalty is prescribed that may in some instances go to the person suffering special damage from the breach of a statutory duty), where the breach of a public statutory duty does not vest a right of action in a person suffering special damage against the person guilty of the breach. The circumstances are generalized in the words of Lord Tenterden in *Doe dem. the Bishop of Rochester v. Bridges*:¹ "Where an act creates an obligation, and enforces the performance in a specific manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case."

Two canons. Hence there are two canons—the first, stated by Blackburn, J., delivering the opinion of the consulted judges in the *Mersey Docks Trustees v. Gibbs*,² "in the absence of something to shew a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same thing." The second, when a statute creates an obligation and enforces the performance in a specific manner, not only is the public remedy by indictment excluded, but also any rights of private persons apart from the statute creating the right;³ and the obligation, if unperformed, can only be enforced by the penalty⁴ or by those for whose benefit the right is conferred.

Statement in
Addison on
Torts adopted
in Canada in
Finlay v.
Miscampbell.

The principle applicable is extracted, in a Canadian case,⁵ from *Addison on Torts*,⁶ and adopted as follows: "Where no

¹ 1 B. & Ad. 847, at 859; cited and approved, *Stevens v. Jeacocke*, 11 Q. B. 731, at 742.

² L. R. 1 H. L. 93, at 110; *Sanitary Commissioners of Gibraltar v. Orfila*, 15 App. Cas. 400, at 412.

³ Per Lord Campbell, 3 E. & B. 402, at 412. Where a penalty is given by statute, one moiety to the King, the other to a common informer, the King may sue for the whole, unless a *qui tam* action has been previously commenced: *The King v. Hymen*, 7 T. R. 536.

⁴ Cp. (1874) *Gorris v. Scott*, L. R. 9 Ex. 125; (1868) *Buxton v. North-Eastern Railway Company* L. R. 3 Q. B. 549. A penalty may sometimes not import a prohibition but be in the nature of a tax on the adoption of a certain line of conduct; see *The Creole*, 2 Wall. Jun. (U. S. Circ. Ct.), 485. See *Musgrove v. Chun Teong Toy* (1891), App. Cas. 272.

⁵ *Finlay v. Miscampbell*, 20 Ont. R. 29, per Ferguson, J., at 39. This is merely a re-assertion of the distinction taken in *Rex v. Robinson*, 2 Burr. 799, at 803, which had been expressed long before in *Castle's case*, Cro. Jac. 644, and in *Regina v. Wigg*, 2 Salk. 460.

⁶ (6th ed.) 74, (4th ed.) 40.

specific right is created and vested in the plaintiff for his own benefit and advantage, and no specific duty in favour of the plaintiff has been imposed, but the statute merely prohibits a thing being done under a penalty for doing it, an action for damages is not maintainable; and further, when a duty or obligation exists at common law independently of the statute, a new remedy given by the statute is simply cumulative, and does not preclude the ordinary common law remedy by way of action unless there are express words to that effect." The proper inquiry in such cases is, was the doing of the thing for which the penalty is imposed, lawful or unlawful before the passing of the statute? If lawful, the person offending is liable to the penalty; if unlawful, the penalty is cumulative, or, more accurately, alternative.¹

As to the case where the statute prohibits an act but does not prescribe a remedy, the effect is formulated by Bowen, L.J., in *the Queen v. Tyler and International Commercial Company*:² "It may, therefore, I think, be taken that where a duty is imposed upon a company in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence which can be visited upon the company by means of indictment."

Bowen, L.J.,
in *the Queen v. Tyler*.

In an American case,³ an endeavour was made to carry the liability to a person specially injured by breach of a statutory duty one stage further than in the English cases we have just been considering; and where a city corporation had made a contract for the supply of water for extinguishing fires which was not performed by the contractor, whereby a person sustained damage, a claim based on the contract with the city was brought by the person damnified, not against the city but against the contractor, in respect of his breach of duty. The answer of the Court appears conclusive: "The present case is not based upon the breach of a statutory duty, but solely upon failure to comply with a contract made with the municipal government of Athens. To that contract the plaintiff was no party, and the action must fail for the want of the requisite privity between the parties before

Action against
defaulting
contractor for
breach of
contract to
perform
statutory duty
by a stranger.

¹ The rule in criminal cases is stated in *The Queen v. Miles*, 24 Q. B. D. 423, at 431; 52 & 53 Vict. c. 63, s. 33. This does not affect the right of civil action.

² (1891) 2 Q. B. 588, at 592, following *Reg. v. Birmingham and Gloucester Railway Company*, 3 Q. B. 223, and *Reg. v. North of England Railway Company*, 9 Q. B. 315. *The Queen v. Mayor and Justices of Bodmin* (1892), 2 Q. B. 21, follows *Ex parte Thompson*, 6 Q. B. 721, in holding that where one rule for a mandamus has been refused, the Court will not grant a subsequent application on the same matter, though with supplementary materials.

³ *Fowler v. Athens City Waterworks Company*, 20 Am. St. R. 313.

the Court." "There being no ground for recovery, treating the action as one *ex contractu*, is it better founded treating it as one *ex delicto*? We think not. The violation of a contract entered into with the public, the breach being by mere omission or non-feasance, is no tort, direct or indirect, to the private property of an individual, though he be a member of the community and a taxpayer to the government." "We are unable to see how a contractor with the city to supply water to extinguish fires, commits any tort by failure to comply with his undertaking, unless to the contract relation there is superadded a legal command by statute or express law."

Breach of statutory duty to provide schoolhouse.

Here also may be noted the Scotch case of *Birrell v. Anstruther*,¹ which was an action by the representatives of a schoolmaster, in which it was averred that defenders were under statutory obligation to provide a suitable house for the deceased, but culpably failed to do so; and the house provided by them under their statutory obligation was left in a state unfit for human habitation for several years previous to the death of the deceased, which was caused thereby. The Court, however, held that no cause of action was disclosed; for it was averred that the schoolmaster had continued to live in the house after it had become uninhabitable, and also there was no relevant averment of culpable homicide.² His remedy, says the Lord Justice-Clerk, "was to refuse to live in such a house, and to go and live elsewhere, and bring an action of damages against the heritors for the expense and annoyance thereby caused to him. In that way he would have saved his life, and filled his pockets."

Wrong or loss must be special to the individual bringing an action.

But to return to the rule. It is also necessary, in order to bring a case within the operation of the rule, that every breach of a public duty working wrong or loss to another is an injury and actionable, that the wrong or loss should be something special to the individual bringing it. This is made clear in *Glossop v. Heston and Isleworth Local Board*.³ The plaintiff complained that, for some time before and since the defendants became the sanitary authority, sewage was allowed to fall into a stream passing near his residence so as to pollute it and cause a nuisance to him. After complaint to the defendants, and nothing done, plaintiff brought an action against them for damages and for an injunction.

¹ 5 Macph. 20, at 23.

² *Gorris v. Scott*, L. R. 9 Ex. 125, lays down that when a statute created a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss.

³ 12 Ch. Div. 102. Cp. *Attorney-General v. Guardians of Poor of Dorking Union*, 20 Ch. Div. 595; *Attorney-General v. Clerkenwell Vestry* (1891), 3 Ch. 527; *Stretton's Derby Brewery Company v. Mayor of Derby* (1894), 1 Ch. 431.

The decision was that, assuming "an actionable nuisance existed, as the defendants had done no act to create or increase it, the plaintiff had no cause of action." After holding on the facts that the Board were not guilty of neglect, James, L.J.,¹ thus expressed the principle of the decision: "If they (the defendants) had been guilty of any refusal, such as is necessary for the purpose of applying for a mandamus, or any *mala fide* delay—for it must be brought up to that to make it equivalent to a refusal to take steps—if anything of that kind had occurred, that is not the ground of an action by any proprietor in the district who may be deprived of the benefit he expected to derive from the performance of that duty. If the neglect to perform a public duty for the whole of a district is to enable anybody and everybody to bring in a distinct action or to file a distinct claim because he has not had the advantages he otherwise would be entitled to have if the Act had been properly put into execution, it appears to me the country would be buying its immunity from nuisances at a very dear rate indeed by the substitution of a far more formidable nuisance in the litigation and expense that would be occasioned by opening such a door to litigious persons, or to persons who might be anxious to make profit and costs out of this Act of Parliament. It appears to me the only remedy would be by an application for a mandamus."²

James, L.J.,
in *Glossop v.*
Heston and
Isleworth
Local Board.

This case insensibly leads us to the consideration of another principle—that of the absolute obligation, or the discretion, involved in the performance of certain statutory works. We have seen that it is not the law that a local board is liable to private persons for mere failure to carry out powers conferred by statute, unless there is an absolute obligation on them to do so.

Absolute
obligation or
discretionary
power.

Now, "If a matter is left to the discretion of any individual or

¹ 12 Ch. D. 102, at 114. See per Lord Herschell, *Cowley v. Newmarket Local Board* (1892), App. Cas. 345, at 352.

² The law that determines whether proceedings for a wrong are to be by indictment is thus stated by Holt, C.J., *Ashby v. White*, 1 Sm. L. C. (9th ed.), 268, at 296: "If men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense. Suppose the defendant had beat forty or fifty men, the damage done to each one is peculiar to himself and he shall have his action. So if many persons receive a private injury by a public nuisance every man shall have his action, as is agreed in *Williams's case*, 5 Co. Rep. 72 b; and *Westbury & Powell's Case*, Co. Lit. 56 a. Indeed, where many men are offended by one particular act, there they must proceed by way of indictment, and not of action: for in that case the law will not multiply actions. But it is otherwise when one man only is offended by that act, he shall have his action; as if a man dig a pit in a common, every commoner shall have an action on the case *per quod communiam suam in tam amplo modo habere non potuit*; for every commoner has a several right. But it would be otherwise if a man dig a pit in a highway; every passenger shall not bring his action, but the party shall be punished by indictment, because the injury is general and common to all that pass. But when the injury is particular and peculiar to every man each man shall have his action."

body of men, who are to decide according to their own conscience and judgment, it would be absurd to say that any other tribunal is to inquire into the grounds and reasons on which they have decided, and whether they have exercised their discretion properly or not.”¹ Or, as Cockburn, C.J., expressed the principle in a case where the question was whether a mandamus should issue to a vestry to make sewers under the Metropolis Management Act, 1855, “In order to constitute a sufficient writ there ought to appear upon the face of it a present duty to be performed and a non-performance of that present duty. This writ only states a general duty in the vestry to make the works in question, and does not shew that in the particular instance it is a present duty to make them.”²

What is a
discretion?
Sir Edward
Coke.

Lord
Halsbury, O.

“Discretion,” as described by Sir Edward Coke,³ “is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, *talis discretio discretionem confundit*,” or as the expression is modernized by Lord Halsbury, L.C., “discretion means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion, according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular; and it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself.”⁴

Where the
duty is
discretionary.

The considerations applicable, where the duty is of a discretionary nature, are well pointed out in some American cases.

¹ Per Lord Tenterden, C.J., *Reg. v. Mayor, &c., of London*, 3 B. & Ad. 255, at 271. See also *Rex v. Archbishop of Canterbury*, 15 East 117; *Reg. v. Visitors of Middlesex Asylum*, 2 Q. B. 433; *Reg. v. Bishop of Gloucester*, 2 B. & Ad. 158; *Wright v. Fawcett*, 4 Burr. 2041.

² *The Queen v. Vestry of St. Luke, Chelsea*, 1 B. & S. 903, at 912; *The Queen v. Tottenham Local Board*, 9 Times L. R. 414 (C.A.). There is a case of the negation of judicial discretion in *Carter v. McLaren*, L. R. 2 H. L. Sc. 120. In *Reg. v. Guardians of Epsom Union*, 11 W. R. 593, a case on what is a good return to a mandamus, the limits of the liability of a local board are discussed, and also the principles by which the court will be guided in considering their duties and liabilities; *Meador v. West Cowes Local Board* (1892), 3 Ch. 18.

³ *Rooke's case*, 5 Co. Rep. 99 b. As to the distinction between a wide and general discretion and a narrow one, see *Allcroft v. Bishop of London* (1891), App. Cas. 666, where *Rex v. Mills*, 2 B. & Ad. 578, is cited. See the note on discretion, 8 How. St. Tr. 55. Lord Mansfield said, in *Rex v. Wilkes*, 19 How. St. Tr. 1075, at 1089: “Discretion, when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful; but legal and regular.” Also see per Willes, J., *Lee v. Bude and Torrington Junction Railway Company*, L. R. 6 C. P. 576, at 580; and per Jessel, M.R., *In re Taylor*, 4 Ch. D. 157, at 159.

⁴ *Sharp v. Wakefield* (1891), App. Cas. 173, at 179. See *Reg. v. Boteler*, 33 L. J. M. C. 101, a case cited by the Lord Chancellor, in *Sharp v. Wakefield*.

In *Johnston v. District of Columbia*,¹ evidence that the plan on which a sewer had been constructed by municipal authorities had not been judiciously determined on, was held inadmissible to support an action against the municipality by the owner of land injured by the overflow of water from the sewer. The considerations applicable are thus set out in the judgment: "The duties of the municipal authorities in adopting a general plan of drainage and determining when and where sewers shall be built, of what size and at what level, are of a *quasi* judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion in the selection and adoption of the general plan or system of drainage is not subject to revision by a Court or jury in a private action for not sufficiently draining a particular lot of land. But the construction and repair of sewers according to the general plan so adopted are simply ministerial duties; and for any negligence in so constructing a sewer or keeping it in repair, the municipality which has constructed and owns the sewers may be sued by a person whose property is thereby injured." To the same effect is what was with equal force said in a New York case of considerable authority, by Denio, C.J.:² "It is not the law that a municipal corporation is responsible in a private action for not providing sufficient sewerage for every, or for any, part of the city or village. The duty of draining the streets and avenues of a city or village is one requiring the exercise of deliberation, judgment, and discretion. It cannot, in the nature of things, be so executed that in every single moment every square foot of the surface shall be perfectly protected against the consequence of water falling from the clouds upon it. This duty is not, in a technical sense, a judicial one, for it does not concern the administration of justice between citizens; but it is of a judicial nature, for it requires, as I have said, the same qualities of deliberation and judgment. It admits of a choice of means, and the determination of the order of time, in which improvements shall be made. It involves, also, a variety of prudential considerations relating to the burdens, which may be discreetly imposed at a given time, and the preference which one locality may claim over another. If the owner of property may prosecute the corporation on the ground that sufficient sewerage has not been provided for his

Judgment of
Denio, C.J., in
*Mills v. City
of Brooklyn.*

¹ 118 U. S. (11 Davis) 19, per Gray, J., at 20. The leading authorities are referred to in the judgment, *Hutchins v. Frostburg*, 68 Md. 100, 6 Am. St. R. 422.

² *Mills v. City of Brooklyn*, 32 N. Y. 489, at 495.

premises, all these questions must be determined by a jury, and thus the judgment, which the law has committed to the city council or to an administrative board, will have to be exercised by the judicial tribunals. The Court and jury would have to act upon a partial view of the question, for it would be impossible that all the varied considerations which might bear upon it could be brought to their attention in the course of a single trial. Such a system of law would be as vexatious in practice as it is unwarranted in law."¹

Child v. City
of Boston.

Yet, if works in the discretion of the corporation to undertake or to leave, are undertaken, and negligence is shewn in the construction, the corporation is liable.² Thus in *Child v. City of Boston*,³ an action to recover damages, occasioned by reason of the flooding of the basement of the plaintiff's house with drain water, caused through permitting a waste weir to be closed, was held maintainable; because the damage arose from a failure properly to work the sewer appliances and to keep them free from obstruction; this was purely a ministerial duty,

¹ Cp. *Forbes v. Lee Conservancy Board*, 4 Ex. D. 116—a judgment of Pollock, B., considering the law as to discretionary powers of commissioners. In *York and North Midland Railway Company v. The Queen*, 1 E. & B. 858, it was unanimously decided in the Exchequer Chamber before Jervis, C.J., Pollock, C.B., Cresswell, Williams, and Talfourd, JJ., and Parke, Alderson, Platt, and Martin, BB., overruling the Queen's Bench (Lord Campbell, C.J., and Crompton, J., Erle, J., dissenting), and also the Queen's Bench cases, *The Queen v. Lancashire and Yorkshire Railway Company*, 1 E. & B. 228; *The Queen v. Great Western Railway Company*, 1 E. & B. 253: that "to say that there is no difference between words of requirement and words of authority when found in railway acts is simply to affirm that the Legislature does not know the meaning of the commonest expressions," at 864. "It seems to us, therefore, that these statutes [*i.e.*, the special Acts of the company] do not cast upon the plaintiffs in error this duty, either by express words or by implication; that we ought to adhere to the plain meaning of the words used by the Legislature, which are permissive only: and that there is no reason in policy, or otherwise, why we should endeavour to pervert them from their natural meaning," at 865. "We are of opinion that the mandamus cannot be supported, upon the ground that the railway company having exercised some of their powers and made part of their line are bound to make the whole railway authorized by their statute. It is unnecessary here to determine the abstract proposition that a work which before it is begun is permissive, is, after it is begun, obligatory. We desire to be understood as assenting to the proposition of my brother Erle (1 E. & B., at 206), 'that many cases may occur where the exercise of some of the compulsory powers may create a duty to be enforced by mandamus,'" at 870. "The right of mandamus lies" "where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed to its exercise. It does not lie to correct alleged errors in the exercise of its judicial discretion." *In re Hollon Parker*, 131 U. S. (24 Davis) 221; per Field, J., at 226. *The Queen v. Adamson*, 1 Q. B. D. 201, per Cockburn, C.J., at 205; *Ex parte Lewis*, 21 Q. B. D. 191, at 195.

² See *Ashley v. City of Port Huron*, 24 Am. R. 552, and note at 566; *Leader v. Moxon*, 2 Wm. Bl. 924; *Jones v. Bird*, 5 B. & Ald. 837, at 845. In *Brine v. Great Western Railway Company*, 2 B. & S. 402, Crompton, J., says at 411: "The distinction is clearly established between damage from works authorized by statutes, where the party generally is to have compensation, and the authority is a bar to an action, and damage by reason of the work being negligently done, as to which the owner's remedy by action remains;" and this statement is adopted by the judges in *The Mersey Docks and Harbour Board v. Gibbs*, L. R. 1 H. L. 93, 112; *Clothier v. Webster*, 12 C. E. N. S. 790, was an action for negligent laying of a sewer, and was held maintainable. See *Cox v. Paddington Vestry*, 64 L. T. 566.

³ 86 Mass. 41.

“and the defendants were liable for negligence in its exercise to any person to whom their negligence occasioned an injury.”¹ On the other hand, in *Hill v. City of Boston*,² where a child was injured through falling over a staircase, dangerous *through original construction*³ in a schoolhouse provided by the city under a statutory obligation, it was held, in an exhaustive judgment in which all the cases, English and American, are lengthily passed in review, that an action was not maintainable against the city for the injury, as it is “well settled in this Commonwealth that no private action, unless authorized by express statute, can be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage.”⁴ With these cases may be compared the Scotch case of

Wisely v. Aberdeen Harbour Commissioners,⁵ where the substitution of a new and safer method of laying rails for an existing method involving more risk, was held a matter within the discretion of the defendants with which the Court would not interfere.

Wisely v. Aberdeen Harbour Commissioners.

These decisions point to twofold functions on the part of public bodies in the performance of the work for which they are incorporated. They have, first, to exercise their discretionary administrative powers as to the advisability of undertaking proposed works, and as to the general manner in which the work they determine to undertake is to be performed. Thus a corporation are unfettered by legal constraint, so far as a private action against them is concerned, in deciding whether they will have a system of drainage and sewerage, and as to the proportions of the system and the sum to be appropriated to its cost. So soon, however, as the carrying out of the works is undertaken, a new liability arises. While no action can be maintained for disappointing a plaintiff of the benefits he expected to receive, or might reasonably have received, from the construction of an efficient system of drainage, an action is yet maintainable for consequences injurious to the plaintiff, flowing from the carrying out of the plan actually determined on; for instance, if the effect of the plan of drainage is to collect water and to cast it on the land of any one, where of its own accord it would not have flowed, the corporation so acting are liable; because they have no more right to deprive a private citizen of the enjoyment of his property than any other private citizen has.

Distinction between the duty to undertake work and the duty after having undertaken it, to do it efficiently.

¹ 86 Mass. at 53.

² 122 Mass. 344, 23 Am. R. 332.

³ *Cormack v. School Board of Wick*, 16 Rettie 812, is a case of deteriorated condition, not of originally unsafe construction.

⁴ 122 Mass. at 345.

⁵ (1887) 14 Rettie 445.

If it is sought to escape responsibility by shewing that the work is efficiently done in accordance with a predetermined plan,¹ and that the injury is caused by the defect of the plan itself, and it is contended that for mere defect of plan there is no liability on the corporation, since the determination in regard to that is discretionary or judicial, the answer is that so long as the plan is merely passively ineffectual, so long as it does not afford to all the whole benefit they may have reasonably looked to derive from an efficient plan, the contention that no action lies in respect of the defect is a sound one;² but where the plan in its execution involves an actual invasion of another's property, there is no protection; or, to state the matter somewhat differently, against the mere incompleteness or inadequacy of the plan as a solution of a given problem, there is no redress, but such incompleteness or inadequacy is of no avail as a defence to an action for trespass or interference with the property or rights of others.³ The principle is neatly stated by Lush, J., in *Hall v. The Mayor, &c., of Batley*:⁴ "If damage ensues as the consequence of work properly done, it must be sought for by a claim for compensation; but if, as the result of negligence in the doing of it, it is properly the subject of an action."

Principle of liability stated by Lush, J., in *Hall v. Mayor, &c., of Batley*.

Colac v. Summerfield and Raleigh v. Williams.

The subject now being discussed has twice recently been before the Privy Council—in *President, &c., and Ratepayers of Colac v. Summerfield*,⁵ and in *Corporation of Raleigh v. Williams*.⁶ In the latter case it was argued, on the one hand, that if work constructed under a by-law duly passed turns out in the result not to answer its purpose by reason of some inefficiency or some defect which a competent engineer ought to have foreseen and guarded against, or if the result of a drainage work, for example, is to damage a person's land by throwing water on it, there is actionable negligence on the part of the municipality. On the other hand, the contention was that when an engineer is employed by a municipality to do work, the municipality thereupon becomes a helpless instrument in the hands of the engineer

¹ *Ashley v. Port Huron*, 24 Am. R. 552, and the cases there cited.

² Cp. *Stretton's Derby Brewery Company v. Mayor, &c., of Derby* (1894), 1 Ch. 431.

³ *Ruck v. Williams*, 3 H. & N. 308; *Baltimore and Potomac Railroad Company v. Fifth Baptist Church*, 108 U. S. (1 Davis) 317; *Bates v. Inhabitants of Westborough*, 151 Mass. 174; *Seifert v. City of Brooklyn*, 101 N. Y. 136. In *Mills v. City of Brooklyn*, 32 N. Y. 489, cited above, on the contrary, it was held that where defects exist in the plan of a public improvement, there is no liability for damages occasioned by them. In *Chalkley v. Richmond*, 29 Am. St. R. 730, it is laid down that where a sewer controlled by a city is so negligently constructed or altered as to cause water and excrement to flow into a private person's cellar, the city is liable in damages for the nuisance after notice to abate it. The cases on liability for defects in, and want of repair of, sewers, are collected in a note, 29 Am. St. R. 737-744.

⁴ 47 L. J. Q. B. 148, 151.

⁵ (1893) App. Cas. 187.

⁶ (1893) App. Cas. 540, 550.

they employ. The Privy Council negatived both these contentions, but without formulating any definite principle in substitution. The limits of liability they marked out seem, however, to accord completely with the most authoritative of the cases we have been considering. The municipality, says Lord Macnaghten, delivering the opinion of the Board, "cannot indeed modify the engineer's plan themselves. That is no part of their business. But they may return the plan for amendment if they think that it is not desirable in the shape submitted to them. If, however, acting in good faith, they accept the engineer's plan and carry it out, persons whose property may be injuriously affected by the construction of the drainage work must seek their remedy in the manner prescribed by the statute."

In a Canadian case,¹ where an owner had (in the particular instance without the authority of the corporation) connected his drain with a sewer belonging to the defendant corporation, which, becoming choked, caused an overflow of the drain, for which the owner brought an action against the corporation, some valuable remarks were made by Cameron, C.J.,² as to the liability of a corporation for damage caused by the overflow of drains. First, "it must be shewn affirmatively that the corporation required the property owners to use the public drain by connecting the private drains therewith. Secondly, that the drain or sewer has been improperly and negligently constructed, and injury results in consequence of such negligent and improper construction, or that the same has become obstructed and the corporation has negligently omitted to remove the obstruction within a reasonable time after knowledge or notice of the obstruction, and injury results to the plaintiff after such reasonable time for removal after such knowledge or notice has been had by the corporation; or third, the corporation brings to the plaintiff's land, by means of the drain or sewer, more water than would otherwise come to the same, and pours it wilfully upon the said land, or after bringing the water to the land negligently allows it to escape and flow over the land." Of course, in the case before the Court no action lay, for the connecting with the corporation drain was the plaintiff's own and uninvited act; but, disregarding this consideration, there must be besides some positive act of negligence to import chargeability.³

Classes of negligence in the management of sewers for which corporations are liable.

¹ *Welsh v. Corporation of St. Catharines*, 13 Ont. R. 369; see *Parkdale Corporation v. West*, 12 App. Cas. 602.

² 13 Ont. R. at 379.

³ In *Stainton v. Woolrych*, 26 L. J. Ch. 300, the execution of drainage works incidentally interfered with the flow of water from a spring, but the Court refused an injunction because the works were authorized by Act of Parliament, but if the injury had been caused by the improper or unskilful execution of them, then the Court would have granted relief.

Via major is a valid excuse for the non-performance of a statutory duty.¹

Distinction between powers conferred with a duty to exercise them, and powers conferred with an absolute discretion.

In the case of powers *prima facie* discretionary, a further distinction must be drawn between, first, those where the object for which the power is conferred, is for the purpose of enforcing a right; in which case there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right when required on their behalf. When there is such a duty it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it. Secondly, those where the discretion is absolute.

Backwell's case.

The earliest case in which discretionary words were held to create a duty, is that of Alderman Backwell.² The creditors of Alderman Backwell petitioned for a commission of bankruptcy against him under a statute³ which enacted that the Lord Chancellor or Lord Keeper, upon every complaint made to him in writing against such person, being bankrupt, "shall have full power and authority, by commission under the Great Seal," to issue a commission. When the Exchequer was closed in 1676 many bankers who had deposited their money there were unable to meet their demands. Alderman Backwell, who was one, fled to Holland, leaving his son to make terms with his creditors. Notwithstanding all the help the Government and the Lord Keeper could give it was decided that on the statute the Lord Keeper was bound to issue the commission. The next case is *The King v. Barlow*,⁴ an indictment on the 14 Car. II. c. 12, against churchwardens for not making a rate to reimburse constables. The words used were "may make a rate." It was held they were bound to make one. Then came the *King v. Havering atte Bower*,⁵ where a charter gave the steward and suitors of a manor authority to hear and determine civil suits. It was held that they were bound to hold the court.

The King v. Barlow.

The King v. Havering atte Bower.

Cases under the County Court Act.

Next came three cases under a County Court Act,⁶ providing that, on its being proved by affidavit by the plaintiff that a cause of action was one in which there was concurrent jurisdiction, the court in which the action is brought, or a judge at chambers, "may thereupon, by rule or order, direct that the plaintiff shall recover costs." In *Jones v. Harrison*⁷ the Court of Exchequer

Jones v. Harrison.

¹ *River Wear Commissioners v. Adamson*, 2 App. Cas. 743; *In re Richmond Gas Company v. Mayor, &c.*, of Richmond (1893), 1 Q. B. 56.

² (1683) 1 Vern. 152.

³ 13 Eliz. c. 7, s. 3 (rep. 6 Geo. 4, c. 61, s. 1).

⁴ 2 Salk. 609.

⁵ 5 B. & Ald. 691.

⁶ 13 & 14 Vict. c. 61, s. 13 (rep. 51 & 52 Vict. c. 43, s. 188).

⁷ 6 Ex. 328.

had construed this as giving the Court a discretionary power to refuse the rule. In *Macdougall v. Paterson*¹ the Court of Common Pleas arrived at a different conclusion, Jervis, C.J., stating the rule to be that when a statute confers an authority to do a judicial act in a certain sense it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right—that is, having by statute the right to make the application. In *Crake v. Powell*² the Queen's Bench, having the conflicting opinions of the Exchequer and the Common Pleas before them, adopted the reasoning of the latter, Lord Campbell saying, "If the plaintiff be entitled to costs, and the Court or judge is empowered to make a rule or order for that purpose *ex debito justitiæ*, he may call upon the Court or judge to do so."

*Morisse v. Royal British Bank*³ was very similar. There power was conferred upon the Courts to grant execution against a shareholder by a creditor who had obtained judgment against the company and issued execution against it without effect. It was held to be obligatory on the Court to grant it.

To the same effect are *Reg. v. Rotherham Local Board*⁴ and *Worthington v. Hulton*;⁵ where under the Public Health Act, 1848,⁶ the local board "may" make rates. On the application of judgment creditors, they were compelled to make rates for the purpose of satisfying judgments obtained against them.

In *The Queen v. Tithe Commissioners*,⁷ where power was given to the tithe commissioners to confirm agreements for commutation of tithe in certain circumstances, Coleridge, J., thus expresses the rule: "It has been so often decided as to have become an axiom that, in public statutes, words only directory, permissive, or enabling may have a compulsory force, where the thing to be done is for the public benefit or in advancement of public justice." Lord Cairns, C., in *Julius v. Bishop of Oxford*,⁸ regarded this as too broadly expressed, since the cases "appear to decide nothing more than this: that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that

¹ 11 C. B. 755.

² 2 E. & B. 210.

³ 1 C. B. N. S. 67.

⁴ 8 E. & B. 906.

⁵ L. R. 1 Q. B. 63.

⁶ 11 & 12 Vict. c. 63 (rep. 38 & 39 Vict. c. 55, s. 343).

⁷ 14 Q. B. 459.

⁸ 5 App. Cas. 214, at 225.

power ought to be exercised, and the Court will require it to be exercised."

Rule laid
down by Lord
Cairns, C.

The rule for the distinction of the two classes of cases—those where there are discretionary words coupled with a duty, and those where the discretion is unfettered by a duty—is also expressed by Lord Cairns, C., in the case just referred to;¹ discussing the effect of the words "it shall be lawful," he thus discriminates: "The words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right and authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so. Whether the power is one coupled with a duty such as I have described is a question which, according to our system of law, speaking generally, it falls to the Court of Queen's Bench to decide on an application for a mandamus. And the words 'it shall be lawful' being, according to their natural meaning, permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power to shew, in the circumstances of the case, something which, according to the principle I have mentioned, creates this obligation."²

Distinction
between a
corporation
and a natural
person with
reference to
the power of
incurring
liabilities.

A distinction of some importance still remains to be treated—that between a corporation and a natural person with reference to the power of incurring liabilities. A natural person is presumed capable of acquiring all classes of rights and becoming subject to all classes of liabilities within the range marked out by the legal system of the State of which he is a member. But a corporation has a definite scope and limit, outside which it may not presume to act without risking its very existence. If, on the true construction of the instrument creating a corporation, it appears—whether expressly or by implication is of no moment³—that the corporation is precluded from acting in any particular way, a contract to act in that particular way entered

¹ *Julius v. Bishop of Oxford*, 5 App. Cas. 214, at 222.

² See *Dormont v. Furness Railway Company*, 11 Q. B. D. 496, at 502.

³ *Rex v. Mayor, &c., of London*, 1 Show. 274, at 280; 8 How. St. Tr. 1039. *Brice, Ultra Vires* (3rd ed.), 43, 60.

into on behalf of the corporation is wholly void, and cannot be ratified.¹

A more difficult question is whether a corporation is liable for a tort distinctly authorized by it, yet outside the limits of the corporate powers.

There are a large number of railway cases where the point is whether acts admittedly wrongful, done by the officers of companies in assumed advancement of the companies' interests, are within the scope of the duty of those officers sufficiently to render the companies liable for their misfeasance; or whether, in any way, an implied authority to do them could be inferred so as to charge the companies for the fault of their officers. The conclusion from them is that an agent has no implied authority to commit a tort *ultra vires*, and cannot on that ground merely bind his principal corporation.²

Acts of agent how far binding on corporations.
I. When authority to act implied.

The question now to be considered differs from these in that an express and definite instruction exists to do an act which when done is wrongful and outside the objects of the company's constitution. To what extent, then, is the corporate property bound to compensate the wrong done by the direction of the corporation while professing to act, and believing themselves to act, as a corporation, though in a manner not authorized by their powers?

II. When expressly given in a matter *ultra vires*.

The point is glanced at by Blackburn, J., in *Poulton v. London and South-Western Railway Company*,³ where he says: "In the present case an act was done by the station-master completely out of the scope of his authority, which there can be no possible ground for supposing the railway company authorized him to do, and a thing which could never be right on the part of the company to do. *Having no power themselves they cannot give the station-master any power to do the act.* Therefore the wrongful imprisonment is an act for which the plaintiff, if he has a remedy at all, has it against the station-master personally, but not against the railway company."⁴ This was in accordance with the view that had long been accepted.

Blackburn, J., in *Poulton v. London and South-Western Railway*.

In *Harman v. Tappenden*⁵ an action was brought against members of corporations in their private characters for acts done

Harman v. Tappenden.

¹ *Ashbury Railway Carriage and Iron Company v. Riche*, L. R. 7 H. L. 653, at 673. *Baroness Wenlock v. River Dee Company*, 10 App. Cas. 354. Whenever a duty is imposed on a public body, costs incidentally and necessarily incurred in protecting the interests and duties of such body may be paid by means of any rate the body has power to make: *The Queen v. White*, 14 Q. B. Div. 358.

² *Poulton v. London and South-Western Railway*, L. R. 2 Q. B. 534.

³ L. R. 2 Q. B. 534, at 540.

⁴ See note to *Maund v. Monmouthshire Canal Company*, 4 M. & G. 452, citing, at 453 note (c), *inter alia*, *Bro. Abr. Corporation*, 43, where *Lib. Assis.* 22 *Edw. III.* 100, pl. 67, is referred to.

⁵ (1801) 1 *East* 555, at 560. Cp. the same judge, *The King v. Holland*, 5 T. R. 607, at 623.

in their corporate capacity. It was questioned by Lord Kenyon, notwithstanding two early cases,¹ whether the defendants were liable. He referred to a case he had argued before Lord Mansfield against the Master and Fellows of Wadham College, where "the Master had great objection with respect to the facts agreed upon by a majority to be returned, conceiving that he would thereby make himself individually liable to the consequences; but Lord Mansfield overcame his difficulty by an explicit declaration that what he thus did in his corporate capacity could not hurt him in his individual character." The case itself does not seem to throw any light on the point now being considered, as the act for which the defendants were sued was of a judicial nature, and the defendants acted to the best of their judgment.

Maund v. Monmouthshire Canal Company.

In *Maund v. Monmouthshire Canal Company*² the question was whether trespass would lie against a corporation for the acts of its officers done within its authority; *Yarborough v. Bank of England*,³ was held to conclude the matter in the affirmative. The case was argued on motion in arrest of judgment, and a valid mandate from the Bank to do the wrongful act was presumed.

As against the application of these decisions to the present question, it may be contended that the acts done were committed about a matter necessarily incident to the corporation business, and that, had the corporation not been held liable, an immunity from liability for torts would have been the necessary result.⁴

Lord Brougham's dicta in *Ferguson v. Kinnoull*.

In *Ferguson v. Kinnoull*,⁵ Lord Brougham, commenting on *Harman v. Tappenden*, notes that though Lord Kenyon and Lawrence, J., express doubts how far individual corporators can be sued, yet, notwithstanding this, Lawrence, J., appeared to hold "that the action lay, if the defendants had in their corporate capacity tortuously procured the acts complained of to be done by the corporate body; and both he and Lord Kenyon

¹ *Rich v. Pilkington* (1690), *Carthew* 171, an action against the Lord Mayor of London in his private capacity for an act done with others in his private character, to which there was a plea in abatement; but see per Lord Lyndhurst in *Ferguson v. Kinnoull*, 9 Cl. & F. 251, 4 St. Tr. N. S. 785; and *Rex v. Rippon*, 1 Ld. Raym. 563, at 564, a case of mandamus to the Corporation of Ripon, citing *Enfield v. Hills* (1679), Sir T. Jones 116. The report concludes thus: "The Court perceiving that the cause raised great heats between the parties, and faction in the City (of Canterbury), they were exhorted to peace and amity. Whereupon the parties agreed amongst themselves (as I think), for no judgment was given."

² (1842) 4 M. & G. 452.

³ (1812) 16 East 6, where the learning on the cases is collected in the judgment of Lord Ellenborough, C.J.

⁴ On this subject consult Pollock, *Contracts* (5th ed.), 112 *et seqq.*; Brice, *Ultra Vires* (3rd ed.), 416.

⁵ 9 Cl. & F. 251, at 301; 4 St. Tr. N. S. 785.

agree that, for injurious acts wilfully and maliciously done, the corporators were liable in their individual character, though not for mere error of judgment." The case in which this remark Comment. occurs is a Scotch case, in which the same learned lord had previously remarked: "There is a great laxity in the Scotch law as regards corporations. Almost any set of persons authorized in any way to act together, or continuing to act together for a length of time, seems to be regarded as a corporation."¹ Lord Brougham's opinion seems moulded with strict reference to the local facts before the House, where the defenders to the suit were the majority of the Presbytery of Auchterarder; for he avoids enunciating any definite proposition on English law, and distinguishes a Scotch corporation from an English one on the ground that "new corporations with us"—i.e., in England—"can only be created by statute or by grant from the Crown," while in Scotland "many private persons have the power of granting what is termed 'Seal of Cause,' which creates a corporation."² Notwithstanding the head note to this case, as reported in the State trials,³ states the proposition without limitation: "Where the refusal"—to perform a public duty—"is the act of the majority of a corporation or other body, the members of the majority are individually liable." A proposition so broad as this does not appear anywhere in the speeches of the learned law lords. The nearest approach to it appears in the speech of the Lord Chancellor, where the ground taken is the same as that taken in *Rich v. Pilkington*.⁴ The wrongful act was not a corporate act, but the act of a collection of individuals. Where this is so, individual liability follows; and the test of whether any act, though wrongful, is a corporate act, or the act of a collection of individuals, is indicated in the argument of the Solicitor-General⁵ to be whether in doing a thing they have a right to do as a corporation they are guilty of a mere error of judgment, or whether in doing a thing they have no right to do as a corporation they act perversely.

The question of the individual liability of a member of a corporation did arise in *Mill v. Hawker*,⁶ where an action was brought against the surveyor and members of a highway board in their private character for acts committed by the surveyor under the order of the Board. From the course taken at the

¹ 9 Cl. & F. at 301.

² The Scotch law seems also established by *Gray v. Forbes*, 5 Cl. & F. 356.

³ 4 St. Tr. N. S. 785. In 9 Cl. & F. 251, the head note on this point is: "If the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures. If several are jointly bound to perform the duty, they are liable, jointly and severally, for the failure and refusal."

⁴ Carthew 171.

⁵ Sir W. Follett, *arguendo* 4 St. Tr. N. S. at 801.

⁶ L. R. 9 Ex. 309, L. R. 10 Ex. 92.

Conflict of
opinion in the
Exchequer.

View of
Cleasby and
Pigott, BB.

Kelly, C.B.,
dissents.

On appeal to
Exchequer
Chamber,
point not
decided.

Kelly, C.B.'s,
language care-
fully limited.

trial, the fact that the act done was wholly outside the powers of the Board was taken for granted. The element of perversity was, however, absent. The majority of the Court¹ held that in respect of corporate acts the individual members of the corporation could not be sued. "It is clear that this is so when the corporate acts are such as the corporate body is qualified to perform, and the resolutions and acts of the members are only introductory to the corporate body acting in the matter. But it is equally clear that when the acts are such as the corporate body is not by law qualified to do, and the corporate body, if they pretend to do them, are acting *ultra vires*, then the mere fact of giving a corporate form to the act does not prevent it from being the act of those who cause it to be done."² The Lord Chief Baron (Kelly) dissented. In a judgment in which all the authorities are collected and considered, he thought it "settled law that no action lies against the individual members of a corporation for a corporate act done by the corporation in its corporate capacity, unless the act be maliciously done by the individual charged, and the corporate name be used as a mere colour for the malicious act, or unless the act is *ultra vires*, and is not, and cannot be, in contemplation of law a corporate act at all."³ "An individual corporator is no more liable for a tort committed in his corporate capacity than for a debt due by the corporation. In either case I am of opinion that the action must be brought against the corporation in its corporate character and not against an individual member."⁴ The Exchequer Chamber declined to decide the point, Blackburn, J., saying:⁵ "It is one of considerable importance and great difficulty. If it were necessary to decide that question, we should require time for consideration, and possibly when we had considered it our decision would not be unanimous. . . . We think it better, therefore, to leave the decision of the Court of Exchequer upon that point as it is. We leave it with the authority it had before—no better and no worse."⁶

The remark of Kelly, C.B., obviously refers only to the former of the classes noted above, where corporators acting with reasonable latitude err in their judgments and so infringe others'

¹ Cleasby and Pigott, BB.

² L. R. 9 Ex. 309, at 317.

³ L. c. at 321. See remarks on the same point by Crompton, J., Reg. v. Train, 9 Cox. C. C. 180, at 184.

⁴ L. R. 9 Ex. 309, at 322.

⁵ L. R. 10 Ex. 92, at 94.

⁶ This matter is now usually settled by statutory provisions in the case of corporations entrusted with administrative functions of local government; see Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 265; Public Health (London) Act, 1891, 54 & 55 Vict. c. 76, s. 124.

rights. Strangely enough, *Ferguson v. Kinnoull* does not seem to have been cited in the argument, and is not noticed in the judgments, either in the exchequer or in the Exchequer Chamber; yet Kelly, C.B.'s, language might well be used as based on the distinction indicated by the Solicitor-General in his argument in *Ferguson v. Kinnoull*, and certainly cannot be used as an authority against individual liability where the wrongful act is perversely done under the shadow of a corporate name.

The point is touched on by Lord Bramwell in giving an illustration in *Abrath v. North-Eastern Railway Company*:¹ "If the directors even, by resolution at their board, or by order under the common seal of the company," "were maliciously, with the view of putting down a solicitor who had assisted others to get damages against them, to order a prosecution against that man, if they did it from an indirect or improper motive, no action would lie against the corporation, because the act on the part of the directors would be *ultra vires*; they would have no authority to do it." This case, it may be noted, would be within the exception stated by Kelly, C.B., where "the corporate name be (is) used as a mere colour for the malicious act." Under the doctrine of *Ferguson v. Kinnoull* the peccant directors would be individually liable for their torts.

Lord Bramwell
in *Abrath v.*
North-Eastern
Railway.

In the United States the question is settled. There the rule laid down is, that a corporation is liable to the same extent and in the same circumstances as a natural person for the consequences of their wrongful acts, and will be held responsible in a civil action, at the suit of an injured party, for every grade and description of forcible, malicious, or negligent tort or wrong which they commit, however foreign to their nature or beyond their general powers the wrongful transaction or act may be;² or, to quote the words of Swayne, J.;³ "Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application." "An action may be maintained against a corporation for its malicious or negligent torts however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for

Point settled
in America.

Swayne, J., in
National Bank
v. Graham.

¹ 11 App. Cas. 247, at 251.

² *Reed v. Home Savings Bank*, 130 Mass. 443, at 445; *New York and New Hampshire Railroad Company v. Schuyler*, 34 N. Y. 30; *Merchants Bank v. State Bank*, 10 Wall. (U.S.) 604; *Central Railroad and Banking Company v. Smith*, 52 Am. R. 353; *Denver, &c., Railroad Company v. Harris*, 122 U. S. (15 Davis) 597; 2 Kent, Com. 284, and Mr. Holmes, note to 12th ed., On the liability of corporations for the torts or negligences of their directors, servants, and agents. Cp. *South Hetton Coal Company v. North-Eastern News Association* (1894), 1 Q. B. 133 (C. A.), as to the circumstances in which a corporation may sue in respect of libel.

³ *National Bank v. Graham*, 100 U. S. (10 Otto) 699, at 702.

Campbell, J.,
in Philadelphia, &c.
Railroad
Company v.
Quigley.

fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel. In certain cases it may be indicted for misfeasance or nonfeasance touching duties imposed upon it in which the public are interested. Its offences may be such as will forfeit its existence." The liability was expressed by Campbell, J., at an early stage of the series of cases in which the point is mooted, in the leading case of *Philadelphia, &c. Railroad Company v. Quigley*.¹ "The result of the cases is," said he, "that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances. At a very early period it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents of nearly every variety."² In the most recent case again,³ Gray, J., delivering the opinion of the Court, says: "This Court has often" "affirmed the doctrine that for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible, in the same manner and to the same extent, as an individual is responsible under similar circumstances." "A corporation is doubtless liable like an individual to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal." "A corporation may even be held liable for a libel, or a malicious prosecution by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation."

Salt Lake City
v. Hollister.

The course of the United States decisions seems, therefore, uniformly to have run in the channel pointed out in this decision, and the doctrine of *ultra vires* does not appear to have been recognised as applicable to the case of torts, for which corporations are held responsible irrespective of the limits to their power of lawfully doing the acts out of which they arise. The distinction between the case of contracts and torts in this respect is pointed out in *Salt Lake City v. Hollister*.⁴ "The question," it is there said, "of the liability of corporations *on contracts* which the

¹ 21 How. (U. S.) 202, at 210.

² The learned judge then cites authorities for his proposition, *inter alia*, *National Exchange Company of Glasgow v. Drew*, 2 Macq. (H. L. Sc.) 103.

³ *Lake Shore, &c. Railroad Company v. Prentice*, 147 U. S. (40 Davis) 101, at 109.

⁴ (1890) 118 U. S. (11 Davis) 256: *Central Transportation Company v. Pullman Car Company*, 139 U. S. (32 Davis), 24, 46; criticized *Dillon Municipal Corporation* § 1192, n. 1, as too wide; see also *Pollock, Contracts* (5th ed.), Appendix D, Limits of

law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force or restraint or fraud is practised on him. The powers of these corporations are matters of public law open to his examination, and he may and must gauge for himself as to the power of the Corporation to bind itself by the proposed agreement."

The United States rule seems an intelligible one, and, reasoning from the analogy of the now recognised liability of corporations at English law for fraud,¹ for malicious prosecution,² for libel,³ and for intentional misfeasance,⁴ will probably be applied by the English Courts whenever the point calls for decision, adopting the line of reasoning indicated by Kelly, C.B., in his dissentient judgment in *Mill v. Hawker*, and emphasised by what was said in the Common Pleas, by Erle, C.J.:⁵ "We think it extremely important that these companies should be held responsible where they admit they have intentionally done a wrongful act, and that those whom they have injured should not be driven to seek a doubtful remedy against their officers or servants, who may be wholly unable to answer the compensation which the jury may award to the injured party."

Tendency of opinion.

Further, it seems clear that a chartered corporation may forfeit its charter by nonfeasance. In the *City of London Case*⁶ it was conceded in argument that a corporation might be dissolved for refusal to act. In the subsequent case of the *City of London v. Vanacre*,⁷ Holt, C.J., laid down that "All franchises are granted

Effect of nonfeasance on the position of a corporation.

Corporate Powers. In *Salmon v. Hambrough Company* (1672), *Cases in Chancery*, 204, the House of Lords directed contributions to be levied on the members of a company to pay the plaintiff's debt, the assets of the company being insufficient for the purpose. There are articles on the Liability of Corporators in the *American Law Magazine*, vol. i. 96, vol. iv. 92, 362.

¹ *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Ranger v. Great Western Railway Company*, 5 H. L. C. 72, per Lord Cranworth; *Royal British Bank, Ex parte Nichol*, 28 L. J. Ch. 257, per Lord Chelmsford, C., at 265. The Chancery cases are not quite consistent on this subject. Brice, *Ultra Vires* (3rd ed.), 426.

² *Bank of New South Wales v. Owston*, 4 App. Cas. 270; *Edwards v. Midland Railway Company*, 6 Q. B. D. 287. See, however, Lord Bramwell in *Abrath v. North-Eastern Railway Company*, 11 App. Cas. 247, at 250; but see also the remarks of Earl of Selborne, at 256, as to malice in a corporation. *Rex v. Mayor, &c. of London*, 1 Show. 274; 8 How. St. Tr. 1039, 1305, 1309. In the *Queen v. Great North of England Railway Company*, 9 Q. B. 315, an indictment was held to lie against a corporation for misfeasance. It seems to have been taken to be indisputable that a corporation is indictable for a wrongful omission of duty. See *Pharmaceutical Society v. London and Provincial Supply Association*, 5 App. Cas. 857, per Lord Blackburn, at 869; *The Interpretation Act 1889* (52 & 53 Vict. c. 63), ss. 2, 19; *Short and Mellor, Crown Practice* 98; C. O. R. 1886, r. 30.

³ *Whitfield v. South-Eastern Railway Company*, E. B. & E. 115.

⁴ *Green v. London General Omnibus Company*, 7 C. B. N. S. 290.

⁵ *Ibid.* at 303; in this case the corporation was a trading one created by statute.

⁶ 8 How. St. Tr. 1039.

⁷ 12 Mod. 270, at 271.

its own emolument and from which it derives special advantages, or for the increased comfort of its citizens, or for the well ordering and convenient regulation of particular classes of the business of its inhabitants, but are not exercised in the discharge of those general and recognised duties which are undertaken by the government for the universal benefit." Duties of the former kind are duties of preserving the peace and protecting property; of the latter the right to make sewers, to provide gas and water, to establish parks, or to build markets.

Position of the Metropolitan police force.

In the Metropolitan Police District there is plainly no more than a personal liability attaching to any member of the Metropolitan police force for negligence in his office; since the force is under the direction of the Secretary of State for the Home Department,¹ and the superior officers are not employers; while the Crown, which is the employer, cannot be sued in tort.²

Position of the county police force.

In the counties the control of the police is mainly regulated by the County Police Acts; of which the principal are 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88.³ By sec. 6 of the earlier of these Acts the chief constable has the power of appointment and dismissal of petty constables; so that an action against the county justices as the superintending power is excluded by their want of power of control, even if, on other grounds, a liability might be established. Between the chief constable and the petty constable the relation is, as we have seen, no more than that between a manager with full powers and the staff he supervises.

Position of the borough police.

The Municipal Corporation Act, 1882,⁴ Part ix. Police, provides for the appointment of constables in boroughs by a watch committee, appointed by the council. Sec. 191 requires that any constable shall obey "all such lawful commands as he receives from any justice having jurisdiction in the borough, or in any county in which the constable is called to act."⁵ Thus neither in the corporation, nor in the watch committee, nor in the justices, nor yet in the chief constable, do those qualities inhere which are necessary to be found for the purpose of establishing a relation raising a legal liability.⁶

¹ 10 Geo. IV. c. 44; 2 & 3 Vict. cc. 47, 71; 19 & 20 Vict. c. 2.

² *Whitfield v. Lord Le Despencer*, 2 Cowp. 754; *Tobin v. The Queen*, 16 C. B. N. S. 310.

³ There are numerous amending and extending Acts which are to be found in the official Index of Statutes, and see sched. 5 of the Police Act 1890 (53 & 54 Vict. c. 45).

⁴ 45 & 46 Vict. c. 50.

⁵ Sec. 192, again, refers to a supervision by the Secretary of State.

⁶ The rule of *Respondeat superior* is based upon the right which the employer has to select his servants, to discharge them if not competent or skilful or well-behaved, and to direct and control them while in his employ. The rule has no application to a case in which the powers do not coexist. *Maximilian v. Mayor, &c. of New York*, 62

When an action is brought against a corporation for the negligent exercise of their powers, a question often arises as to what state of the facts is sufficient to raise the presumption of negligence against the defendant corporation. Where the matter is one of which *res ipsa loquitur*, there is no difficulty. But it may happen that the mere existence of the thing complained of is not actionable without proof of some default on the part of the corporation. If, for example, a duty were imposed on a corporation to clear away street refuse within a reasonable time after it is deposited on a street; and the evidence merely points to the existence of refusal at a definite point of time, without any indication whether it had been long on the street or only just placed there, the *onus* of the plaintiff would not be discharged, since the facts are equally consistent with liability or non-liability. In this case, in America, the rule adopted is that it is necessary to bring home to some of the officers of the corporation actual notice of the circumstances relied on to establish default prior to the happening of the accident; or to affect them with implied knowledge by showing the circumstances to have been sufficiently notorious for it to be reasonable to fix the corporation with notice of them; in this latter case the jury will be warranted in concluding that the circumstances can only be explained by attributing them to negligence. This rule has been adopted in the Canadian Courts,¹ but the point does not appear to have come up directly for decision in any English reported case.

Onus of proof in case of corporation charged with negligence.

N. Y. 160. Officers of the fire department of a municipality have been held to be in the same category as the police, *Burrill v. City of Augusta*, 78 Me. 118. For other officers in the same position, *e.g.*, overseers of the poor, assessors and collectors of taxes, see the cases cited by Allen, C.J., *Tindley v. City of Salem*, 137 Mass. 171, at 174. A medical officer of health was held not a servant of a corporation in *Forsyth v. Canniff*, 20 Ont. R. 478.

¹ *Town of Portland v. Griffiths*, 11 Can. S. C. R. 333, per Gwynne, J.; at 344; *Castor v. Uxbridge*, 39 U. C. Q. B. 113, at 127, where the American cases are noted. The law on the subject of valid by-laws is summarized in 1 Woodd. Lec. 495-500. "A by-law," says Sir George Treby in his argument in the *King v. The City of London*, quoting Hobart, C.J., to a corporation "is a mind as reason is to a man, but it hath no moral mind," 8 How. St. Tr. 1039, at 1134.

CHAPTER IV.

HIGHWAYS, TURNPIKES, CANALS, ETC.

I. HIGHWAYS.

In this connection we are not concerned with the law of highways to a greater extent than is necessary to investigate the liabilities for negligence arising in the construction, maintenance, or user of highways; for the general law we must refer to the special and recognised treatises on the subject.¹

Definition.

A highway in English law² is the largest expression to designate a public way, and includes all roads, bridges (not being county bridges), carriage-ways, cartways, horseways, bridle-ways, footways, causeways, churchways, and pavements, and is a way open to all the King's subjects, and not to a limited number only.³

¹ *E.g.*, Glen, *Law of Highways*; Russell, *Crimes* (5th ed.), vol. i. 444, *Nuisances to Highways*; *Dovaston v. Payne*, 2 Sm. L. C. (9th ed.) 154.

² 5 & 6 Will. IV. c. 50, s. 5. Probably the earliest record of the construction of straight highways is of those made by King Archelaus of Macedonia, and noted by Thucydides, bk. ii. 100, ὁδοὺς εὐθείας ἔτεμε, κ.τ.λ. This Archelaus is the patron of Euripides and the tyrant whose crimes are recounted by Plato in the *Gorgias*, § 59. The law of highways in the Civil Law is to be found in D. 43, tit. 7-13.

Various kinds of highways.

³ *The King v. Richards*, 8 T. R. 634. In law, public rivers are highways: *Mayor of Colchester v. Brooke*, 7 Q. B. 339. "The right of navigation," says Lord Halsbury, C., in *Orr Ewing v. Colquhoun*, 2 App. Cas. 839, at 846, "is simply a right of way." As to placing a permanent obstruction, *Eastern Counties Railway Company v. Dorling*, 5 C. B. N. S. 821; *Rex v. Lord Grosvenor*, 2 Stark (N.P.), 511. A "railway is a public highway to be used in a particular mode. A footway can be used only for foot passengers and not by others, yet it is certainly a public highway: per Holroyd, J., *The King v. Severn and Wye Railway Company*, 2 B. & Ald. 646, at 648. In Gibbon, *Law of Dilapidations* (2nd ed.), 298, it is said: "A way merely leading to a church, a village, or a private house, and therefore not useful to the public generally, is not a highway." For this proposition Katherine Austin's case, 1 Vent. 189, is cited. "An indictment was found against her that she *vi et armis* a certain part of the King's highway leading from Shoreditch Church to Stoke Newington, through Hogsdon, *postibus et repagulis incluit*, &c." The true bearings of the proposition, however, appear clearly in *Thrower's case*, 1 Vent. 208: "He was indicted at the sessions of the peace at Ipswich for stopping *communem viam pedestrem ad ecclesiam de Witby*." Hale, C.J.'s judgment is reported as follows: "If this were alleged to be *communis via pedestris ad ecclesiam pro parochianis*, the indictment would not be good, for then the nuisance would extend no further than the parishioners, for which they have their particular suits, but for aught appears this is a common footway, and the church is only the terminus *ad quem*, and it may lead further; the church being expressed only to ascertain it, and it is said *ad commune nocumentum*;" but see the definition in 5 & 6 Will. IV. c. 50, s. 5, set out in the text. In *Young v. Cuthbertson*, 1 Macq. (H. L. Sc.) 455, at 458, Lord Cranworth, C.,

What constitutes dedication.

Each parish ought of common right to repair the highways within its boundaries.¹ Before 1836 any road dedicated to, and used by the public, became a highway repairable by the inhabitants at large.² The Highway Act, 1835,³ added a condition that the parish should not be compellable to repair a road so dedicated, "unless a variety of things were done, one of which is that it shall be made in a substantial manner, and to the satisfaction of the surveyor."⁴ Notwithstanding this, a road may still be a highway, though it is not repairable by the inhabitants at large.⁵

Liability of
parish to
repair.

By an Act in the time of Queen Mary⁶ the care of highways was entrusted to two surveyors for every parish. This Act was made perpetual,⁷ and continued in force till 1767.⁸ The Act at present in force by which the powers and duties of surveyors of highways are defined and regulated is that just alluded to, the

Various statu-
tory enact-
ments.

said: "If, indeed, Starleyburn had been a mere private house to which the public had been in the habit of going from Burntisland, and returning back again, I believe the case would not have properly come within the description of a public right of way; for the owner might destroy the house and shut up the way, and then there would be an end of it. But here the right of way extended further." In *Bourke v. Davis*, 44 Ch. D. 110, at 122, Kay, J., says: "It is argued that a *cul de sac* may be a highway. That is so in a street, in a town, into which houses open, and which is repaired, sewered, and lighted by the public authority at the expense of the public. Lord Cranworth instances Connaught Place which opens into the Edgware Road, *Young v. Cuthbertson*, 1 Macq (H. L. Sc.) 455, at 456, and see *Rugby Charity v. Merryweather*, 11 East 375 n. But I am not aware that this law has ever been applied to a lone tract of land in the country on which public money has never been expended." *Rugby Charity v. Merryweather* is discussed, 3 Kent, Comm. 450. The true principle is said to be that, if there be no other evidence of a grant or dedication than the presumption arising from the fact of acquiescence on the part of the owner, the period of twenty years applicable to incorporeal rights would be required as the period of limitation. Other evidence of intention may shorten the period. As Hale, C.J., says, in the case cited above, *Katherine Austin's case*, "'Tis a matter of fact, and much depends upon common reputation. If it be a public way of common right, the parish is to repair it, unless a particular person be obliged by prescription or custom.'" For the difference between English and Scotch law in constituting a public right of way, see per Lord Blackburn, *Mann v. Brodie*, 10 App. Cas. 378, at 385. As to what a "street" is, and how it differs from a highway under the Public Health Act (1875) see per Jessel, M.R., *Taylor v. Oldham Corporation*, 4 Ch. D. 395, at 408; *Maude v. Baildon Local Board*, 10 Q. B. D. 394; *Robinson v. Barton Eccles Local Board*, 8 App. Cas. 798; *Mayor of Portsmouth v. Smith*, 10 App. Cas. 364. For "way of necessity" see Mr. Holmes's note, 3 Kent, Comm. (12th ed.), 424; *Richards v. Kessick*, 57 L. J. M. C. 48; *Hill v. Wallasey Local Board* (1894), 1 Ch. 133, a private road is a street within ss. 16 and 54 of the Public Health Act, 1875; *Cowley v. Newmarket Local Board* (1892), App. Cas. 345.

¹ *Rex v. Ragley*, 12 Mod. 409; *The Queen v. Inhabitants of Ashby Folville*, L. R. 1 Q. B. 213, where it is doubted whether in point of law a parish could be bound by prescription to repair highways in another parish. As to repair of highways by the inhabitants of a particular district within a parish, *The King v. Inhabitants of Ecclesfield*, 1 B. & Ald. 348; *The Queen v. Rollett*, L. R. 10 Q. B. 469.

² *Reg. v. Tithing of Westmark*, 2 M. & B. 305; *Rex v. Hudson*, 2 Str. 909.

³ 5 & 6 Wm. IV. c. 50, s. 23.

⁴ *The Queen v. Inhabitants of Dukinfield*, 4 B. & S. 158, per Blackburn, J., at 172.

⁵ *Roberts v. Hunt*, 15 Q. B. 17.

⁶ 2 & 3 Ph. & M. c. 8.

⁷ 29 Eliz. c. 5, s. 2, repealed 42 & 43 Vict. c. 59.

⁸ 7 Geo. III. c. 42, s. 57, repealed 13 Geo. III. c. 78, s. 86, repealed 5 & 6 Will. IV. c. 50, s. 1.

Highway Act, 1835.¹ In the Metropolis, the district boards and vestries have the powers of surveyors conferred on them by the Metropolis Management Act, 1855.² By the Public Health Act, 1875,³ every urban authority is to be the surveyor of highways in its district. By the Highway Act, 1862,⁴ in highway districts the powers of surveyor of highways were vested in the highway boards. Now by the Local Government Act, 1894,⁵ highway boards are abolished, and the district council for every rural district has transferred to it the powers, duties, and liabilities of any highway authority within its district; and the rural district council is constituted surveyor of highways.⁶ In all the above cases, where the powers of the surveyor vest in local authorities, the surveyor appointed by the local authority is the officer to perform the duties that attach to the surveyor under the Highway Act, 1835.⁷

Action for
non-repair
will not lie.

We have already seen⁸ that an action does not lie for an injury arising merely from non-repair of a highway; because the liability was in the parish, and at common law no action could be maintained against it.⁹ An indictment might be preferred against the inhabitants of a parish or township for non-repair of a highway, or against the inhabitants of a county for the non-repair of a bridge;¹⁰ though it does not lie against their officers.¹¹ This liability to repair continues, notwithstanding any agreement with the owners of houses alongside a highway to do the repairs.¹² As between the parish and the owners there is the liability on the contract.

Presentment
of highways
out of repair
abolished.

Formerly justices of assize and of the peace might have presented highways which were out of repair; now, by 5 & 6 Will. IV. c. 50, s. 99, it is not lawful to take any legal proceedings by presentment against the inhabitants of any parish or other person on account of any highway being out of repair.

¹ 5 & 6 Will. IV. c. 50, s. 6 of which provides for surveyors being elected by the inhabitants; and s. 11 for their appointment by justices in certain events. As to the attendants with which this power in justices must be exercised, see *Regina v. Bost and others*, 5 D. & L. 40.

² 18 & 19 Vict. c. 120, s. 96.

³ 38 & 39 Vict. c. 55, s. 144.

⁴ 25 & 26 Vict. c. 61.

⁵ 56 & 57 Vict. c. 73, s. 25.

⁶ 38 & 39 Vict. c. 55, s. 144, incorporated in 56 & 57 Vict. c. 73, s. 25, sub-s. 1.

⁷ 38 & 39 Vict. c. 55, s. 144.

⁸ *Supra*, 360.

⁹ See per Lord Kenyon, *Russell v. Men of Devon*, 2 T. R. 667, at 672.

¹⁰ Hawk. P. C. bk. 1, c. 77, s. 3; *The Queen v. Birmingham and Gloucester Railway Company*, 3 Q. B. 223.

¹¹ *The King v. Dixon*, 12 Mod. 198.

¹² *The King v. The Mayor, &c. of Liverpool*, 3 East. 86; see *Alldred v. West Metropolitan Tramways Company* (1891), 2 Q. B. 398; for the effect of a contract under *The Tramways Act, 1870* (33 & 34 Vict. c. 78), s. 29. Cp. *The Queen v. Inhabitants of Ashby Folville*, L. R. 1 Q. B. 213.

Section 94 of the same Act substitutes a method, by which, ^{5 & 6 Will. IV. c. 50, s. 94.} on the oath of a credible witness before a justice of the peace, a summons may be issued requiring the surveyor or other person chargeable with the repairs to appear before the justices at special highway sessions. The justices may then either themselves inspect the highway, or appoint some competent person to do so; and may¹ on the hearing of the summons convict the surveyor or person chargeable in any penalty not exceeding £5, and such further sum as would defray the estimated expenses of putting the highway in repair; to which purpose it is to be applied.

By the following section, if the obligation to repair is disputed, ^{Indictment.} a bill of indictment may be preferred.

There is also the mode of proceeding by information. ^{This Information.} is in the discretion of the Queen's Bench Division; which will never give leave to file an information, for not repairing a highway, unless it appear that the grand jury have been guilty of gross misbehaviour in not finding a bill. A reason why this method should be resorted to but rarely is that the fine set on conviction upon an information cannot be expended in the repair of the highway, whereas on an indictment it is always so expended.²

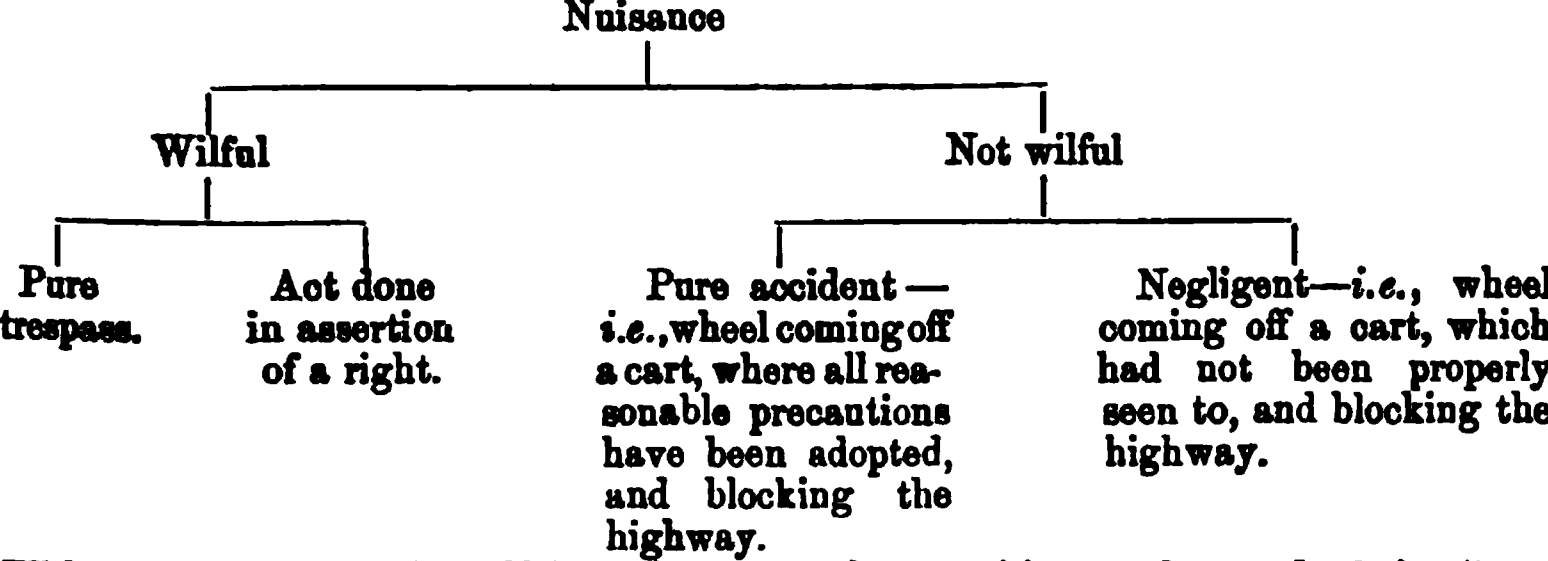
The condition of a highway must constitute a nuisance at law before the remedy by indictment is available.

A nuisance has been defined as being an offence against the ^{Definition of nuisance.} public, either by doing a thing which tends to the annoyance of all the King's subjects, or the neglecting to do a thing which the common good requires.³ Kindersley, V.C., in *Soltau v. De* ^{Kindersley, V.C., in Soltau v. De Held.}

¹ The justices may, notwithstanding the report, exercise a discretion whether to convict or not: *Regina v. Lord Radnor*, 4 Jur. 460, s. c. *sub nom.* *Regina v. Justices of Wilts*, 8 Dowl. Prac. Cas. 717.

² *Rex v. Steyning*, Sayer 92; Bac. Abr. Highways (G). Mandamus will not lie: *The Queen v. Trustees of Oxford and Witney Turnpike Roads*, 12 A. & E. 427.

³ Hawk. P. C. bk. 1, c. 75, s. 1. Nuisances may be thus divided:—



With the whole class of "wilful" nuisances we have nothing to do; and of the "not wilful" our concern with the species "pure accident" is merely incidental. Our inquiry is with those acts which are "negligent" in the proper meaning of the term—where, that is, there is absence of some care that ought to have been taken. Obstructions, it

Held,¹ is more lengthy to the same effect. He says: "To constitute a public nuisance, the thing must be such as in its nature or in its consequences is a nuisance—an injury or a damage, to all persons who come within the sphere of its operation, although it may be so in a greater degree to some than it is to others. For example, take the case of the operations of a manufactory, in the case of which operations volumes of noxious smoke or of poisonous effluvia are emitted. To all persons who are not within the reach of those operations it is more or less a nuisance in the popular sense of the term. It is true that, to those who are nearer to it, it may be a greater nuisance, a greater inconvenience, than it is to those who are more remote from it; but, still, to all who are at all within the reach of it, is more or less a nuisance or inconvenience."

Pollock, C.B.,
in *Bamford v.*
Turnley.

Pollock, C.B., in *Bamford v. Turnley*,² did not think that "nuisance," for which an action will lie, is capable of any general legal definition. What is a nuisance must at all times be a question of fact with reference to all the circumstances of the case. "Most certainly in my judgment it cannot be laid down as a legal proposition or doctrine, that anything which, under any circumstances, lessens the comfort or endangers the health or safety of a neighbour, must necessarily be an actionable nuisance. That may be a nuisance in Grosvenor Square which would be none in Smithfield Market, that may be a nuisance at midday which would not be a nuisance at midnight, that may be a nuisance which is permanent and continual which would be no nuisance if temporary or occasional only."

Knight Bruce,
V.C., in
Walter v.
Selfe.

Knight Bruce, V.C., in *Walter v. Selfe*,³ defined a "nuisance" as "an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober simple notions among the English people."⁴

is manifest, may be common to all these four; though the proper scope of a treatise on Negligence is to consider any act done without the amount of care required in the class of acts of which it is a case, or any act omitted to be done in a class where an obligation to act is imposed. The first statute on public nuisances is 12 Ric. II., c. 13 (repealed 19 & 20 Vict. c. 64); Reeves, *Hist. of English Law* (2nd ed.), vol. iii. 212.

¹ 2 Sim. (N. S.) 133, at 142; *Rogers v. Elliott*, 146 Mass. 349, 4 Am. St. R. 316, is like *Soltau v. De Held* in its facts, with the exception that Rogers brought an action for injuries caused by the defendant's ringing the church bell for the usual services. The ground was that he was suffering from sunstroke, and the annoyance of the bell was intolerable. See *Benjamin v. Storr*, L. R. 9 C. P. 400.

² 3 B. & S. 62, at 79.

³ 4 De G. & S. 315, at 322.

⁴ This was approved in *God Heatley v. Benham*, 40 Ch. Div. 80, per Cotton, L.J., at 94, per Bowen, L.J., at 98. Under the Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), s. 8, it was decided that a nuisance must be something injurious to health, *Great Western Railway Company v. Bishop*, L. R. 7 Q. B. 550. See now the enumeration of nuisances in Public Health (London) Act, 1891 (54 & 55 Vict. c. 76, s. 8. In

It is a nuisance to suffer ditches along a highway to be foul,¹ **Examples.** to suffer boughs of trees growing near the highway to overhang it so as to incommode the passage,² to dig a ditch or make a hedge across a highway, or to do any act whatever that renders it less commodious to the public;³ so, too, is every contracting or narrowing of a highway,⁴ and generally any act or omission whereby the convenience of the way becomes lessened.⁵

The care of a highway is the business of the surveyor of highways for the district in which the highway is situated. The functions of surveyor of highways, which were originally exercised by an individual, have by various Acts of Parliament come to be vested in the bodies concerned with the local administration; and they appoint officers by whom the actual duties of the office are performed, acting as servants of the local authority.⁶ **Statutory modification of common law non-liability.**

Though the authority exercising the office of surveyor of highways is not liable for nonfeasance, this immunity may be, and sometimes is, taken away by the provisions of special Acts.⁷

The common law rule with regard to highways by which, whenever it pleased the owner of land to dedicate land as a highway to the public, it became the duty of the parish to maintain it, has been altered by statute;⁸ so that now no road shall be **Highway repairable by the parish cannot be constituted without complying with statutory formalities.**

Malton Local Board v. Malton Farmers Trading Company, 4 Ex. D. 302, Stephen, J., held that under The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 114, nuisance was not confined to matters injurious to health. This was followed in *Banbury Urban Sanitary Authority v. Page*, 8 Q. B. D. 97, with reference to s. 47; and in *Bishop Auckland Sanitary Authority v. Bishop Auckland Iron Company*, 10 Q. B. D. 138, with reference to s. 91. Nuisance under 29 & 30 Vict. c. 90, s. 19, includes an overcrowded house though occupied by one family only, *The Guardians of the Rye Union v. Payne*, 44 L. J. M. C. 148. See *Norris v. Barnes*, L. R. 7 Q. B. 537, and the two succeeding cases; also the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), 4 sub-s. 3 (c.).

¹ Hawk. P. C. bk. i. c. 76, s. 149.

² *Ibid.* See 5 & 6 Will. IV. c. 50, s. 72; *Walker v. Horner*, 1 Q. B. D. 4. The cases on "wilful obstruction" under the s. 72 are collected in *Gully v. Smith*, 12 Q. B. D. 121.

³ Hawk. P. C. bk. i. c. 76, ss. 144, 145.

⁴ 1 Russell, Crimes (5th ed.), 474; but now see 27 & 28 Vict. c. 101, s. 51.

⁵ Wellbeloved, Highways, 440.

⁶ 2 & 3 Ph. & M. c. 8, and 22 Car. 2, c. 12, made provision for the choosing two surveyors for a year to amend the highways leading to market towns. By 3 W. & M. c. 12, the justices were to appoint one, two, or more surveyors out of a list of inhabitants of each district furnished by the inhabitants of those who have £10 per annum in their own or their wife's right, or £100 personal estate, or farm £30 per annum, "or if no such, of the most sufficient." By 13 Geo. III. c. 78, this last enactment was varied by providing that "the constables and householders assessed to public rates shall name ten inhabitants" qualified as above, from whom the justices are to choose "if they think them qualified; if not, from other substantial inhabitants or occupiers of lands living within three miles of the place in the country." Then came the Highway Act, 1835, 5 & 6 Will. IV. c. 50, which at present regulates the office of surveyor of highways, subject to the vesting of the office in local bodies by 18 & 19 Vict. c. 120, s. 96, 38 & 39 Vict. c. 55, s. 144, and 56 & 57 Vict. c. 73, s. 25.

⁷ *Hartnall v. Ryde Commissioners*, 4 B. & S. 361; *Ohrby v. Ryde Commissioners*, 5 B. & S. 743, as explained in *Gibson v. Mayor of Preston*, L. R. 5 Q. B. 218; *Cowley v. Newmarket Local Board* (1892), App. Cas. 345; with this compare *Lamley v. Mayor, &c. of East Retford*, 55 J. P. 133, and *ante*, 356.

⁸ 5 & 6 Will. IV. c. 50, s. 23.

deemed a highway repairable by the parish unless three months' notice be given to the surveyor of the intention to dedicate; and unless such proposed road be substantially made to his satisfaction and that of two justices, who are to view and certify, and whose certificate is to be enrolled at the next sessions. The surveyor, on receipt of the notice, is to call a vestry, and, if they deem the new road not of sufficient utility, the question is to be determined by the next special sessions for the highways.¹ Save in this way no liability can be imposed on a parish contrary to its wishes, though the road may be used by the public, and rights over it acquired adversely to the owner,² apart from any sanctions whatever.

Liability of
surveyor of
highways
under 5 & 6
Will. IV., c. 50.

The liability of a surveyor of highways under The Highway Act 1835³ is thus stated by Pollock, C.B., in *Young v. Davis*:⁴ "A positive obstruction of or nuisance on a road, whether caused by a surveyor of highways or any other person, would no doubt render responsible the person who caused the obstruction or nuisance; but, looking at the statute and course of legislation, I am clearly of opinion that the Legislature never intended to make a surveyor of highways personally responsible at the hazard of a jury finding him guilty or not guilty of negligence in not repairing the road."⁵

The local authority exercising the office of surveyor of highways, or the surveyor of highways himself, where the provisions of the Highway Acts are not modified by the later legislation, are liable for their own acts or the acts of their servants in the execution of the duties which belong to the office of surveyor of highways, subject to the general rules of law that are to be observed in questions arising between master and servant.⁶

¹ *The Queen v. Justices of Derbyshire*, E. B. & E. 69; *The Queen v. Bagge and Another*, 44 L. J. M. C. 45.

² *The King v. Inhabitants of Leake*, 5 B. & Ad. 469, approved and followed in *The Grand Junction Canal Company v. Petty*, 21 Q. B. D. 273, where the public had the use of a towing-path as a footpath, on the ground that to permit such an user was not inconsistent with its statutory use by the company as a towing-path. *The King v. Wright*, 3 B. & Ad. 681; *The King v. Mellor*, 1 B. & Ad. 32; *Grand Surrey Canal Company v. Hall*, 1 M. & G. 392; *Roberts v. Hunt*, 15 Q. B. 17; *The Queen v. Thomas*, 7 E. & B. 399; *Vernon v. Vestry of St. James, Westminster*, 16 Ch. Div. 449.

³ 5 & 6 Will. IV. c. 50.

⁴ (1862) 7 H. & N. 760, at 771, Ex. Ch., 2 H. & C. 197. Under the Highway Act, 1835 (5 & 6 Will. IV. c. 50), ss. 51-54, the surveyor may take materials for the repair of the highways in his district in the manner therein specified. By s. 55, if he makes holes in getting materials he shall cause them to be filled in or fenced. In case of neglect after specified notices, he may be fined a sum not exceeding £10, and every surveyor within twenty-one days of his appointment is required to fill up or secure existing holes under penalty of 10s. for every default.

⁵ By the Public Health Act, 1875 (38 & 39 Vict. c. 55) s. 265, the local authority and their officers are protected from personal liability. There is a similar section in the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 124.

⁶ *Alston v. Scales* (1832), 9 Bing. 3, under the Act 13 Geo. III. c. 78. See 5 & 6 Will. IV. c. 50, s. 69, by which a surveyor cannot remove an obstruction without an order in writing from a justice; *Keane v. Reynolds*, 2 E. & B. 748. Cp. *White v. Feast*, L. R. 7 Q. B. 353; *Denny v. Thwaites*, 2 Ex. D. 21.

The distinction between a surveyor appointed by an urban sanitary authority under section 189 of the Public Health Act, 1875, and the surveyor of highways appointed under the Highway Act, 1835, must be borne in mind; since it is only in respect of ministerial acts that the former officer can act as surveyor of highways. The real surveyor of highways is the urban sanitary authority which appoints him.

Blackburn, J., in his judgment in *Foreman v. Mayor of Canterbury*,¹ thus distinguishes between them: "Mr. Denman correctly stated the law, when he said that they² would not be liable simply because they were surveyors of highways; but there is nothing in the Act which would relieve them merely because they were surveyors from liability which they would otherwise incur. In an ordinary case,³ where the surveyor of highways is acting for a township or parish, he would be clearly liable for any act of his own personal negligence. There is nothing to relieve him from that. If he had left the stones in the road in such a way as has been described⁴ he would be personally liable for the negligence. If he was himself the master of the servants, he would be equally responsible for their negligence. But in fact, and in practice, the surveyor never is the master of the persons who are employed on the roads. There is no matter of law that would prevent him being so. If, by any arrangement he made with the parish, he took upon himself to do the work by his servants, he would be re-

Foreman v. Mayor of Canterbury, Blackburn, J., distinguishes between the surveyor of highways under the Highways Act and the surveyor to the local authorities who are made surveyors of highways by the Public Health Act.

Judgment of Blackburn, J.

¹ L. R. 6 Q. B. 214, at 216, under the Public Health Act, 1848 (11 & 12 Vict. c. 63). See *Adams v. Lakeman*, E. B. & E. 615, as to non-liability of an assistant surveyor, under 5 & 6 Will. IV. c. 50, to a penalty under s. 44 on the ground that such liability attaches only to the statutory surveyor of highways; *Tucker v. Axbridge Highway Board*, 5 Times L. R. 26. It is clear that "any individual who is specially injured by the obstruction has by common law a right to remove that which unlawfully causes a special injury to him. But a private individual has no right to remove an obstruction which causes no special injury to him, but which is simply an obstruction to the road as regards the public in general as distinguished from the individual," per Jessel, M.R., *Bagshaw v. Buxton Local Board*, 1 Ch. D. 220, at 224. This case was considered in *Denny v. Thwaites*, 2 Ex. D. 21, where a surveyor of highways took up and removed a drain and brickwork belonging to the respondent which formed a nuisance and obstruction to the highway. For this the surveyor was convicted by justices acting under *The Malicious Damage Act*, 1861 (24 & 25 Vict. c. 97), s. 52, with committing "damage, injury, and spoil" upon the respondent's property. He appealed, and the Exchequer Division held that the conviction was wrong, on the ground that he was not a private individual "but the surveyor of highways having a control over, and an interest in, the drains laid for carrying off the water, and that in dealing *bonâ fide* with the drains he was not guilty of wilful or malicious damage. As to the respondent's rights it was added that "the owner of the adjoining land only had a qualified property in the drains, &c. subject to the exercise by the surveyor of his control over them." As to damage done "by reason of the exercise of any of the powers" of the Public Health Act, 1875 (38 & 39 Vict. c. 55), see the provision of s. 308. *Nutter v. The Accrington Local Board of Health*, 4 Q. B. Div. 375, affirmed in H. L. 43 L. T. 710, is a decision under the corresponding sec. in the Public Health Act, 1848. As to the extent to which a surveyor of highways is entitled to interfere with the soil, see *Coverdale v. Charlton*, 4 Q. B. D. 104, explained in *Rolls v. Vestry of St. George's, Southwark*, 14 Ch. Div. 785, and *post*, 418.

² *I.e.*, the Local Board of Health.

³ *I.e.*, under the Highway Act, 1835.

⁴ By the side of a road without light.

sponsible for those servants, though he was surveyor of the highways. But, that being an unusual and uncommon state of things, it would require distinct proof to shew that the persons who left the stones in that position were his servants, they generally being the servants of the parish, and the parish being a body which cannot be sued. But when it is a local board who are acting as surveyors,¹ the state of things is in general the other way. The persons who are employed as labourers to mend the highway are in general servants of the local board; although the local board of health are a body who might very well contract with a contractor, yet they are a body who generally do the work themselves, that is, by their servants, and pay those servants. Therefore, generally speaking, as a matter of fact, those who actually do the work, when it is done by a local board of health as surveyors, are servants of the local board of health. . . . The 37th section of the Public Health Act, 1848, requires the local board of health to appoint a surveyor and other persons named as officers and servants; and at the end of the section it is said that they may dismiss at pleasure all the officers and servants except the surveyor, and the surveyor is not to be dismissed without the approval of the General Board of Health.² That being so, it would be a question to consider whether the surveyor whom they are thus required to appoint, and whom they are not allowed to dismiss at pleasure, is in the relation of servant to them in such a way as that, if the matter were being done by the surveyor, and the cause of the mischief were the negligence of the surveyor, the local board of health would be responsible for his negligence."³ The distinction pointed out is of considerable importance in determining liability in these cases.

Pendlebury v.
Greenhalgh,
and Taylor v.
Greenhalgh.

Pendlebury v. Greenhalgh⁴ and Taylor v. Greenhalgh,⁵ arising out of the same accident and on identical facts, with decisions pointing different ways, are yet reconcilable and consistent with Foreman v. Mayor of Canterbury and with each other.

An assistant surveyor appointed under the Highway Act 1835⁶ neglected to fence and to light a road, during the alteration

¹ I.e., under the Public Health Acts or under the Metropolis Management Acts.]

² But see now 38 & 39 Vict. c. 55, s. 189.

³ See District of Columbia v. McElligott, 117 U. S. (10 Davis) 621. Hardcastle v. Bielby (1892), 1 Q. B. 709, decides that a surveyor under 5 & 6 Will. IV. c. 50, s. 56, could not be convicted for having "caused the stones to be laid on the highway, or allowed them to remain at night upon the highway," so as to cause danger, who gave general directions as to the repairing the road to a person who gave orders to the carter who placed them there.

⁴ (1875) 1 Q. B. Div. 36.

⁵ L. R. 9 Q. B. 487 at 489, reversed 24 W. R. 311, as indistinguishable from Pendlebury v. Greenhalgh. The effect of this reversal was that, in the opinion of the Court of Appeal, the distinguishing inference of fact could not in fact be drawn, not that the decision was wrong if the inference could be drawn.

⁶ 5 & 6 Will. IV. c. 50.

of the level of the highway; and an accident happening he was held liable by the Court of Appeal in *Pendlebury v. Greenhalgh*; the case was discriminated from *Taylor v. Greenhalgh*¹ in the Court of Queen's Bench on the fact of "personal interference." Lord Cairns says: "Although the conclusion at which this Court has arrived does not agree with that of the Court of Queen's Bench, the difference is not so much a difference on any point of law as a difference between the view taken by the Court of Queen's Bench of the facts, and the view which this Court takes of the facts as stated in the case." *Taylor v. Greenhalgh* in the Queen's Bench, was decided on the authority of *Foreman v. Mayor of Canterbury*,² and on a finding of the jury that "the defendant did not personally interfere in doing the work, or in directing the road to be left in such a condition as it was left."

The principle underlying these cases is the recognition of the distinction between the liability of a surveyor appointed to carry out the ministerial duties of the surveyor of highways, and the highway authority itself. The one is, *prima facie*, liable only for his personal acts or defaults; the other, for all acts done in the exercise of its powers by those to whom it has entrusted them under the ordinary limitations existing in the law of master and servant or contractor and contractee. The surveyor acting under the orders of a highway board, who does an act which is unlawful, cannot justify it because it was done by the orders of the highway board; but he is personally liable for his act;³ on the other hand, he is absolutely protected when conforming to any orders of the Board within the scope of their duties.⁴

Principle of
the cases.

*Reid v. Darlington Highway Board*⁵ points the other aspect of the matter to that which was most prominent in *Pendlebury v. Greenhalgh*. A highway board instructed their surveyor to employ a certain contractor to do work, which work was accordingly undertaken by the contractor, and carried on without further intervention of the surveyor. On an accident happening, through leaving material unlighted on the road at night, it was held that there was no evidence to fix either the surveyor or the board with liability.⁶ Had the surveyor been the statutory officer under the Highway Act, or had the action been brought against the urban authority under the Public Health Act, 1875, s. 144, the

Reid v.
Darlington
Highway
Board.

¹ See note 5 on preceding page.

² L. R. 6 Q. B. 214.

³ *Mill v. Hawker*, L. R. 9 Ex. 309; L. R. 10 Ex. 92, at 95.

⁴ 25 & 26 Vict. c. 61, s. 16.

⁵ 41 J. P. 581.

⁶ An action under very similar circumstances brought against the contractor is *Blake v. Thirst*, 2 H. & C. 20.

mere fact of non-intervention, otherwise than to set in motion some other agency, would not have been sufficient to rebut the presumption of responsibility. It would then have been necessary, for the exoneration of the defendant, that the work should have been let out to a contractor, and that there should have been no duty on the defendants to see that reasonable care and skill were used in the execution of the work, or that, there being such duty on them, it was performed.¹ "By whom," said Lord Cairns in *Pendlebury v. Greenhalgh*,² "was the fencing and lighting to be supplied? The defendant, no doubt, might have stipulated that the man supplying the labour should supply the light or fencing. The contract, we are informed, was not in writing, and we must take it that the labour alone was contracted for. If the defendant did not contract for the fencing or lighting, then the duty of fencing and lighting remained in the defendant, for which he remained responsible."

*Hyams v.
Webster.*

Akin to this portion of the subject are the cases of *Hyams v. Webster*³ and *Smith v. West Derby Local Board*.⁴ In the former an action was brought against a contractor for that, having under his contract opened a highway for the purpose of constructing a sewer, he had so negligently done the work that the plaintiff's horse stumbled in a hole, and thereby the plaintiff sustained injury. The jury found that the hole was a natural subsidence, thus negating negligence in the filling in. The Court of Queen's Bench⁵ held that, as between the defendant and the public, the defendant's obligation ceased as soon as he had properly reinstated the road; and that it then became the duty of the parish authorities⁶ to look after its subsequent repairs, whether its defective condition arose from subsidence or from ordinary wear and tear. This was upheld in the Exchequer Chamber, on the ground that all responsibility to the public, in excess of that of properly reinstating the road at the completion of the work, was on the parish.

*Smith v.
West Derby
Local Board.*

In *Smith v. West Derby Local Board*,⁷ the action, on similar facts, was brought against the local board. To the objection that "How the subsidence was caused is not known," it was answered: "We cannot go into the *quantum* of evidence; but I think there were facts from which negligence might and ought to have been

¹ *Hughes v. Percival*, 8 App. Cas. 443.

² 1 Q. B. Div. 36, at 41.

³ L. R. 2 Q. B. 264, in Ex. Ch., L. R. 4 Q. B. 138.

⁴ 3 C. P. D. 423.

⁵ Considerable stress was laid in the course of the case upon 18 & 19 Vict. c. 120, ss. 110, 111, 135, and on 25 and 26 Vict. c. 102, s. 33.

⁶ *I.e.*, the surveyors of highways, apart from any special modifications wrought by statutes. See *ante*, 353.

⁷ 3 C. P. D. 423; *Meeling v. Vestry of St. Mary, Newington*, 10 Times L. R. 54.

inferred. The trench was so improperly filled in that a subsidence of from 12 to 15 inches took place—a thing not likely to occur by fair wear and tear if the earth had been properly consolidated.”

The mode of expressing the reasons for this decision is ^{Decision} certainly not logical. The question to be solved is whether the ^{considered.} admitted existence of a certain condition of things can more probably be referred to an artificial, and, by consequence, negligent antecedent, or, on the other hand, to the mere operations of Nature, and, therefore, to a not negligent antecedent. The solution is:—because the condition arises from the artificial antecedent—“the trench,” says the learned judge, “was so improperly filled”—therefore, “there was evidence that the work of filling in the trench had been negligently and improperly done.” That is, by assuming an effect to be due to negligence, negligence in the cause is made inevitable. The whole difficulty of the case arose from the absence of material to make this induction of negligence from. Nevertheless, the decision itself seems unexceptionable, and is, moreover, in accordance with other authorities.¹ The law being that a statutory duty is imposed on the highway authority to see to the maintenance of the highway, the highway authority is liable for any falling short in the discharge of this statutory duty, through acts of their own or acts authorized by them. Where, then, a trench is made in a roadway and filled in, but subsequently a subsidence shews itself in the very place where the excavation had been made, and not accounted for by any other theory, a state of things has arisen from which an inference that the cause was the interference with the highway is more consistent with probability than the assumption of a mere unaccountable operation of Nature; and the jury, or, in the case in point, the county court judge, must say whether the inference will be drawn.² If the jury or the judge will draw the inference, then a state of facts is presented that points to misfeasance, an imperfect execution of a work that must be perfectly carried out, and not mere nonfeasance, the gradual and natural decay of a highway whose want of repair is merely the effect of user and of the operations of the forces of Nature.³

¹ *E.g.*, *Gray v. Pullen*, 5 B. & S. 970.

² *Cp.* *Blackburn, J.*, charge to the jury in *Hall v. Bristol (Mayor of)*, L. R. 2 C. P. 322, with *Trower v. Chadwick*, 3 Bing. N. C. 334, 6 Bing N. C. 1, which are reconciled by Lord Coleridge, C.J., in *Fairbrother v. Bury Rural Sanitary Authority*, 37 W. R. 544, on the ground that in the earlier case negligence was alleged, while in the latter there was no such allegation.

³ *Burrows v. Commissioners of Sewers of the City of London*, 4 Times L. R. 262. As to the effect of a contract between the highway authority and a tramway company liable under their Act for non-repair of a road, see *Howitt v. Nottingham Tramways*

Railway a highway. Duty considered in that point of view. *Gleeson v. Virginia Midland Railroad Company.*

It has been noted¹ that for certain purposes a railway is a highway—with a limited dedication. In *Gleeson v. Virginia Midland Railroad Company*² the duty of keeping the side banks secure was considered; and Lamar, J., after citing *Tarry v. Ashton*³ and *Kearney v. London and Brighton Railway Company*,⁴ is reported as saying: "If such be the law as to persons who, for their own purposes, cause projections to overhang the highway not constructed by them, *a fortiori* must it be the law as to those who, for their own purposes of profit, undertake to construct the highway itself and to keep it serviceable and safe, yet who allow it to be practically overhung from considerations of economy or through negligence." This liability must, moreover, be taken subject to the considerations pointed out in *Sanitary Commissioners of Gibraltar v. Orfila*,⁵ referring to Blackburn, J.'s, canon of construction in the *Mersey Docks v. Gibbs*,⁶ (1) "in the absence of something to shew a contrary intention, the Legislature intends that the body the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same thing;" (2) where the duty of maintaining works remains in reality in some superior body, and those sued are merely those through whom the administration may be conveniently carried on, they are subject to no liability in respect thereof.

Public Authorities Protection Act, 1893.

Previously to the passing of the Public Authorities Protection Act, 1893,⁷ the cases as to special procedure under various general public Acts were numerous, important, and conflicting. By that Act the sections, requiring notice of action to be given or proceedings to be begun in any particular place or within any particular time, or making special provisions as to costs or authorizing a pleading of the general issue, contained in more than one hundred Acts,⁸ including the Highway Act, 1835, The Metro-

Company, 12 Q. B. D. 16, with the remarks upon it by Lord Esher, M.R., *Steward v. North Metropolitan Tramways Company*, 16 Q. B. Div. 556; and *Allred v. West Metropolitan Trams Company* (1891), 2 Q. B. 398; where *Howitt v. Nottingham Tramways Company* was approved.

¹ *Ante*, 392, n.¹.

² 140 U. S. (33 Davis) 435, at 442, where *Virginia Central Railroad Company v. Sanger*, 15 Grattan (Va.) 230, at 237, is cited as establishing that "as accidents as frequently arise from obstructions on the track, as perhaps from any other cause whatever, it would seem to follow, obviously, that there is no one of the duties of a railroad company more clearly embraced within its warranty to carry their passengers safely, as far as human care and foresight will go, than the duty of employing the utmost care and diligence in guarding their road against such obstructions" as are created by rocks from the side sliding down on the track.

³ 1 Q. B. D. 314.

⁴ L. R. 6 Q. B. 759.

⁵ 15 App. Cas. 400, at 412.

⁶ L. R. 1 H. L. 93, at 110.

⁷ 56 & 57 Vict. c. 61.

⁸ See the schedule to the Act.

polis Management Amendment Act, 1862, and The Public Health Act, 1875, are repealed, and an uniform mode of procedure substituted.

1. No action,¹ prosecution, or proceeding² will lie against any person for any act done in intended execution³ of any public statutory duty, or for any alleged neglect thereunder,⁴ unless commenced within six months after the occurrence of the event from which it takes its rise; or in the case of a continuing damage within six months after its cessation.⁵

2. Where the defendant succeeds he is entitled to costs to be taxed as between solicitor and client.⁶

3. Where the action is for damages the defendant may plead tender of amends⁷ before action, or may make a payment into court. If no more is recovered than is tendered or paid the plaintiff is not to recover any costs incurred subsequent to the tender or payment; but the defendant is to have his costs subsequent thereto as between solicitor and client. This provision does not affect the costs of an injunction.

4. Where the defendant is in the opinion of the court not afforded "sufficient opportunity of tendering amends" before the commencement of proceedings, the court may award costs against the plaintiff as between solicitor and client.

The provision of 5 & 6 Vict. c. 97, sec. 4, that where notice of action is required, such notice shall be given one calendar month, at least, before any action shall be commenced, remains unrepealed and operative so far as local and personal acts are concerned.

The amount of repair required to be done to a highway may vary. The earliest case on the point is *Regina v. Inhabitants of Cluworth*.⁸ Amount of repair may vary. As reported in Salkeld, the proposition is laid down that the inhabitants of a parish are not bound to put the road in a better condition than it has been kept in time out of mind; but they are bound to put it in such condition as it has usually been in when at

¹ This includes actions where an injunction is asked, see s. 1 sub-s. (c), and thus supersedes the law laid down in *Flower v. Low Leyton Local Board*, 5 Ch. Div. 347; *Chapman v. Anckland Union*, 23 Q. B. Div. 294.

² *I.e.*, applications under 11 & 12 Vict. c. 44, for *mandamus*, prohibition, or *certiorari*, not made by a department of the Government. The time for moving these writs is limited by the Act to six months; and the law as stated in the *Queen v. Mayor, &c., of Sheffield*, L. R. 6 Q. B. 652, is now altered, except in the case of a *certiorari* to justices.

³ *Clothier v. Webster*, 12 C. B. N.S. 790. The intention is no defence on the merits, *Selmes v. Judge*, L. R. 6 Q. B. 727.

⁴ *Jolliffe v. Wallasey Local Board*, L. R. 9 C. P. 62.

⁵ *Crumbie v. Walisend Local Board* (1891), 1 Q. B. 503.

⁶ *Avery v. Wood* (1891), 3 Ch. 115; *Andrews v. Barnes*, 39 Ch. Div. 133. The general law applies to the plaintiff's costs, 53 & 54 Vict. c. 44, s. 5; R. S. C. 1883, Order lxxv. r. 1. *Reeve v. Gibson* (1891), 1 Q. B. 652; *Hasker v. Wood*, 54 L. J. (Q. B.) 419.

⁷ *Davys v. Richardson*, 21 Q. B. Div. 202.

⁸ 1 Salk. 358, 6 Mod. 163, Holt (K.B.) 339.

its best. In Modern Reports and in Holt the proposition is limited to the case of one bound to repair by prescription. In that case it is evident that the liability arising from custom must be limited by custom. That the proposition was so limited may be inferred from *Rex v. Inhabitants of Henley*,¹ where Patteson, J., ruled at the trial that it is not enough that a road is as good as ever it was or as it usually had been, but, if the necessities of the public require it, the parish are bound to convert it from a green road to a hard road. This direction was afterwards upheld by the Queen's Bench,² where, however, in an incidental allusion to *Regina v. Inhabitants of Cluworth*,³ Bowen, L.J., appears to approve the decision that "at common law the obligation of the parish does not extend beyond the reparation of the existing road." If this be so, in progressive districts under the common law, the roads must have been a serious drag on the enterprise of the community. So far as the reason of the thing goes *Rex v. Henley* appears the better opinion. But there is further authority.

Manley v. St. Helens Canal and Railway Company.
Martin, B.'s judgment.

The case of *Manley v. St. Helens Canal and Railway Company*⁴ contains observations which are absolutely inconsistent with the narrower view, and go to impose a liability ever growing with the exigencies of circumstances. Martin, B., said: "I agree with the Lord Chief Baron that, if we were now discussing what kind of bridge it ought to be, I should say a bridge suitable to the present state of society. I have no doubt that, when this bridge was built, the place near it was a small village; now it has thousands of inhabitants, and to hold that the same bridge which would suffice formerly will do so now, when the place has become a great manufacturing town, would be utterly contrary to reason and good sense. Courts of law must look at these matters with reason and common-sense, and these tell us that undertakings of this sort must be conducted so as to meet the exigencies of society. Is it fitting then that, in the town of St. Helens, there should be a bridge which, when opened, as it may be, at any hour of the day or night, shall leave a gulf in the highway entirely without protection? That is a question for the jury, and all persons would concur that the only verdict they could have found was that which they have found. Had they found the contrary, I should have dissented from their verdict, and thought it a fit one to set aside." These remarks were made where the liability of a commercial company was being considered. But it will not readily be supposed that the state of repair, which the

¹ 10 L. T. (O. S.) 110.

² *Leek Improvement Commissioners v. Justices of Stafford*, 20 Q. B. Div. 794, at 797.

³ 1 Salk. 358.

⁴ 2 H. & N. 840.

authorized highway authorities are to maintain throughout their districts, would be fixed on a laxer principle than that which governs with commercial companies in progressive neighbourhoods.

The King *v.* Inhabitants of Devon¹ is only apparently in opposition to this decision. The indictment there alleged that a bridge was so narrow that the King's subjects could not pass without danger. The distinction between this and the former case was pointed out by Abbott, C.J.,² to be that to hold the defendants liable for the narrowness of the bridge would be "adding to the bridge something which did not exist before," and not merely charging them for a shortcoming in maintaining it in efficient condition. "And," he goes on to say, "if we should lay down the law to be that the inhabitants of a county may be compelled to widen a bridge, I am utterly unable to see why we should not be called upon to say that the inhabitants of a parish are bound to widen a public high road; and the inconvenience arising from such a rule is obvious. The inhabitants of a parish, as such, have no power, except by Act of Parliament, to purchase at their own expense land for the purpose of widening a road; and, if they could be compelled to buy land for such a purpose, I do not see why they should not also be compelled to buy houses."

Neither is *Manley v. St. Helens Canal and Railway Company* inconsistent with *Rex v. Inhabitants of Landulph*,³ where Patteson, J., directed the jury that, if they thought it proved by the evidence that the want of repair arose from the nature of the spot over which the alleged road passed, it would be absurd to require the parish to do repairs which from the nature of things must always be ineffectual.

If a highway be overflowed or out of repair, passengers may justify going on the adjoining land;⁴ that is if the way is public, but not if it is a private way. In the latter case there is no right to go on the adjoining land. This is because the owner of a private way may be bound to repair, and the impassable state of the way

¹ (1825) 4 B. & C. 670. This case seems to have come before the Court by reason of a *dictum* of Lord Kenyon, in *Rex v. Inhabitants of Cumberland*, 6 T. R. 194, that, if a bridge had become of insufficient width, the burden of widening it must be borne by those bound to repair it: *Regina v. Inhabitants of Stretford*, 2 Ld. Raym. 1169.

² 4 B. & C. 670, at 677.

³ 1 M. & R. 393; in the note to this report several cases on the law are collected. As to this case, but on another point, see per Mellor, J., *Bridgwater Trustees v. Bootle-cum-Linacre*, L. R. 2 Q. B. 4; and per Lord Campbell, C.J., *McCannon v. Sinclair*, 2 E. & E. 53, at 56.

⁴ *Taylor v. Whitehead*, 2 Doug. 745. Com. Dig. Chimin (A) Highway (A 1). By the eighth table of the *leges Duodecim Tabularum* roads were required to be eight feet wide and double at corners; while travellers were allowed to drive over the adjoining land if the road was bad.

may be the result of his own neglect. Where the road is public the general good is paramount to private convenience. If, however, the *grantor* of a private way obstruct it, the grantee may go *extra viam* over the grantor's land, and there is no obligation of him to enter upon litigation; since he is entitled to take the simplest remedy in his power.¹

Rights of
public officer
suing.

A public officer suing on behalf of the public may sustain an action by proof that the nuisance in respect of which he sues has been erected on land over which the public have rights of passage which are interfered with by the erection complained of. He need not prove actual damage to the public; proof of the infringement of a right is sufficient. Although the public officer may interfere if he chooses, it is not in all cases his duty to do so. If then in any case he refuses to interfere, an individual suffering damage is not prejudiced in his private rights by the refusal of the public officer. Neither, on the other hand, does a refusal by the public officer to act supersede the necessity of proof, by the plaintiff in a private action, that he has sustained injury special to himself, and beyond that which he suffers as a member of the public. The right on behalf of the public and the right of action of the individual are entirely separate and have no mutual dependence whatsoever.²

Negligence in
the user of a
highway.

We have hitherto considered the position of the surveyor of highways or those exercising his functions with reference to negligence in carrying out his statutory duties. But any member of the public can be negligent in respect of the user of a highway, as well as the authority charged with their maintenance; and it is now necessary to consider those heads of negligence which refer specially to the user of highways, and which occur independently of the statutory duties of surveyors of highways.

No action for
hindering a
person passing
along a
highway.

It was very early determined that no *action* would lie for merely hindering a private person passing along a highway. The reason for this is that the natural effect would be to indefinitely multiply suits. In lieu of action, the remedy is by indictment.³ To entitle a private plaintiff to maintain an action he must shew a particular damage suffered by himself over and above that suffered by the other subjects of the realm.⁴

¹ *Selby v. Nettlefold*, L. R. 9 Ch. 111.

² *Brown v. Gagy*, 2 Moore P. C. C. (N.S.) 341, cited and approved *Bell v. Corporation of Quebec*, 5 App. Cas. 84, at 95.

³ *Pain v. Patrick*, 3 Mod. 289; s.c. *sub nom.* *Paine v. Partrich*, Carthew, 191; s.c. *sub nom.* *Payne v. Partridge*, 1 Shower 255, Salk. 12; Vin. Abr. Chimin Common (D) 2, where the early authorities on "particular damage" are collected; per Vaughan, C.J., *Thomas v. Sorrell*, Vaugh. 330, 335, 341. See *ante*, 116 n. 6 and cases cited.

⁴ *Caledonian Railway Company v. Walker's Trustees*, 7 App. Cas. 259. As to consequential damage, see *Bigg v. Corporation of London*, L. R. 15 Eq. 376. The

For the necessity to prove special damage where a private suit is brought, an early and leading authority is *Iveson v. Moore*.¹ The plaintiff, the owner of a colliery, was obliged to take carts and waggons along a highway almost daily, but by reason of the highway being obstructed he was hindered in his business. The King's Bench were divided, Holt, C.J., and Rokeby, J., being of opinion that no action would lie in respect of the obstruction, because the plaintiff sustained no more particular damage than any other of the King's subjects, who all had the same right to pass this way; Gould, J., on the contrary, was of opinion that the action would lie, "though he agreed that an action would not lie for a public nuisance without special damage, for avoiding multiplication of suits, and therefore, in this case if the plaintiff had concluded only *per quod* his carts or carriages could not pass, it would not have lain nor have been maintainable, yet he was of opinion that some special damage appears to be done to the plaintiff by this stoppage of the way, which is not common to the rest of the King's subjects; and this appears in the *per quod*, the business of which is to close the action and shew the cause of it."² Turton, J., thought that, the application being to arrest judgment, the defect, if any, was cured by verdict. No decision was pronounced, though on the case being subsequently argued before the justices of the Common Pleas and the barons of the Exchequer,³ they were all of opinion that the action lay.

The operative consideration probably was that the plaintiff was not merely casually impeded in his going along the highway, but an additional element of expense was imported into his business by the delay occasioned by the impediment. The language of the judges in the Exchequer Chamber was that "the plaintiff did necessarily suffer an especial damage *more than* the rest of the King's subjects."⁴

In *Winterbottom v. Lord Derby*⁵ the subject of obstructing the

Winterbottom v. Lord Derby.

owner of a ferry cannot maintain an action for loss of traffic caused by a new highway, by bridge or ferry made to provide for a new traffic: *Hopkins v. Great Northern Railway Company*, 2 Q. B. Div. 224.

¹ 1 Ld. Raym. 486; *Maynell v. Saltmarsh*, 1 Keb. 847, was cited, where it was held sufficient special damage to shew that, by reason of the defendant's obstruction of a way, the plaintiff was prevented carrying his corn, whereby it was injured by rain. See, too, *Blagrove v. Bristol Waterworks Company*, 1 H. & N. 369; *Sampson v. Smith*, 8 Sim. 272; *Reeves*, Hist. of Eng. Law (2nd ed.), vol. iv. 384. Y. B. 27 H. VIII. 27, pl. 10. Cp. Lib. Ass. 27 E. III. 133, pl. 6.

² 1 Ld. Raym. at 489.

³ 1 Lord Raym. 495, 12 Mod. 262, under name of *Jeveson v. Moore*. Cp. *Greasley v. Codling*, 2 Bing. 263.

⁴ Lord Penzance's comment in *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243, at 263, on *Ashby v. White*, 1 Sm. L. C. (9th ed.), 185, at 212, is: "The judges do not say a damage of a *different kind or description* from that suffered by other subjects, but 'more than' or 'beyond' their fellow citizens."

⁵ L. R. 2 Ex. 316, per Kelly, C.B., at 322.

passage of the highway was carefully considered. The true principle governing in cases of the sort is there said to be "that he and he only can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade, or calling. A mere passer-by cannot do so, nor can a person who thinks fit to go and remove the obstruction. To say that they could would really in effect be to say that any of the Queen's subjects could."¹

To this statement of the law may be added—that a person injured by an obstruction may remove it, so far as is necessary to enjoy his rights, but only if its continuance does him a special injury; and he must remove it in the manner by which the least mischief is caused. After a judicial decision has been given that an obstruction exists, the right to remove it attaches to that body or person who is entitled to represent the public, although no special statutory power may be given for the purpose.²

What inter-
ferences with
a highway the
law regards.

This being so, the next inquiry is to ascertain the various interferences with a highway which in law are held to create obstructions.³ To this end it is necessary to notice the chief cases decided with reference to obstructing highways; not, however, neglecting the caution succinctly stated by Brett, J.,⁴ that "To maintain an *action* for damage caused by that which is a public nuisance, the damage must be particular, direct, and substantial."

Right of a
frontager to
access.

A distinction that runs through the cases must first be pointed out. The right of a frontager to access to his property from the highway is a different right, and, as far as it is a right of a man to step on his own land, a higher right than that of a

¹ Mayor of Colchester v. Brooke, 7 Q. B. 339, 379.

² Bagshaw v. Buxton Local Board, 1 Ch. D. 220. See Denny v. Thwaites, 2 Ex. D. 21.

³ What constitutes an obstruction was discussed in Att.-Gen. v. Terry, L. R. 9 Ch. 423; Gully v. Smith, 12 Q. B. D. 121; Fearnley v. Ormsby, 4 C. P. D. 136; Walker v. Horner, 1 Q. B. D. 4; Wood v. Esson, 9 Can. S. C. R. 239. The question of what is a defect in a highway was treated at length in Pratt v. Inhabitants of Weymouth, 147 Mass. 245, 9 Am. St. R. 691. In Roberts v. Rose, 35 L. J. Ex. 62, in the Ex. Ch., Blackburn, J., said: "Where a person seeks to justify his having interfered with the property of another for the purpose of abating a nuisance, he may be justified, if the other be a wrongdoer, but only in so far as his interference was necessary for the purpose. And we agree with the Court below that in abating a nuisance, if there be two ways of doing it, that way must be chosen by which the lesser mischief will be done. We are also agreed that where, in the alternative way of abating a nuisance, there may be some wrong done to the property of an innocent person or to the public, that mode cannot be adopted." See Dimes v. Petley, 15 Q. B. 276; Arnold v. Holbrook, L. R. 8 Q. B. 96, where the cases on the right to deviate when the use of footway becomes foundrous, are collected. In Y. B. 22 E. IV. 8, pl. 24, the defendant justified in trespass, by reason of a custom, that they which plough may turn their plough upon the land of another, and that for necessity, and it was held good. In Mitten v. Kaudrye, Poph. 161, the case is put of a man driving cattle through a town, one of whom strays into a house, and the owner of the stray goes in after it. The owner does not thereby commit a trespass. Cp. Tillett v. Ward, 10 Q. B. D. 17.

⁴ Benjamin v. Storr, L. R. 9 C. P. 400, at 407.

mere passenger to pass to and fro on a highway.¹ An obstruction of access to premises is in itself actionable, as being the infringement of a right in property; and it is therefore not necessary to shew special damage, which, we have seen, is required to be proved where the action is for the obstruction only of a public

¹ The Queen v. Pratt, 4 E. & B. 860, at 865; Lade v. Shepherd, 2 Str. 1004; Blundell v. Catterall, 5 B. & Ald. 268—right of going over land to bathe in the sea. The celebrity of the decision in Blundell v. Catterall, and the discussion it has undergone, may perhaps warrant a note on the subject, though not strictly germane to the present treatise. The plaintiff was the lord of a manor bounded on one side by the River Mersey, who by grant from the Crown held the shore to low-water mark. The defendant was a servant at an hotel fronting the shore, the proprietor of which kept bathing-machines. The plaintiff sued for trespass in driving one of these machines across the foreshore with a visitor at the hotel for the purpose of bathing. The defendant's case was that there was a common law right for all the King's subjects to bathe on the seashore, and to pass over it for that purpose on foot, and with horses and carriages. Abbott, C.J., Holroyd and Bayley, JJ., held that the plaintiff could recover; Best, J., dissented. His dissent was based on three separate lines of argument. First, on authority. Bracton, l. 1, c. 12, s. 6, was cited for the proposition—*Riparum etiam usus publicus est de jure gentium, sicut ipsius fluminis*. The majority of the Court denied this authority, on the ground that Bracton had not quoted merely, but interpolated his doctrine from the civil law, with which, they said, the law of England did not agree. Secondly, that as the sea was the highway of the world, free access to it was of great importance. To this the answer was, admitting it to be true, it was irrelevant, since the question at issue was not the importance of getting to the highway of the sea, but the right of traversing the plaintiff's land without his permission. Thirdly—and on this point the very words of Best, J., at 278, must be given: "By bathing, those who live near the sea are taught their first duty—namely, to assist mariners in distress. They acquire, by bathing, confidence amidst the waves, and learn how to seize the proper moment for giving their assistance." This argument "of public convenience" the majority of the Court met with the rejoinder that the greatest public convenience is that the rights of private property should be assured, though it is obvious that the proposition laid down by the learned dissentient judge was somewhat wide and vague as applied to the case of an hotel visitor bathing from a machine. In Hall's Essay on the Rights of the Crown in the Seashores of the Realm (Stuart Moore's, 3rd ed.), 833, a vigorous rally is made to support the judgment of Best, J., and to question the decision. The argument may be summarized: First, the books are silent. When that happens it may be from the clearness of the right which has never been disputed. The case of bathing is one of these cases. Secondly, the right was a customary right. Thirdly, the authority of Bracton, joined with the known habits of men to bathe and swim long prior to written codes, should have been held to establish the right. Fourthly, though Roman and English law do differ on some points, there was no evidence that this is one; and, as fishing and bathing are analogous, and they agree in that, there is an inference that they agree in the common right of bathing. To this it may be answered: First, that the case of bathing is *not* one of the cases from the silence of the books as to which the right may be presumed; and that, if a reason were needed, because the existence of such a right would presume a limitation to private ownership (Fitch v. Rawling, 2 H. Bl. 393). Secondly, that a general custom cannot exist; a local custom was shewn not to exist; and a common law right, without positive evidence of its existence, is not to be presumed. Thirdly, that "the known habits of men to bathe and swim long prior to written codes" was not proved, and it is doubtful if it could be proved; but, could it be proved, it would be irrelevant; even with the authority of Bracton, which is confessedly drawn from the civil law, while the land laws of England are based on the feudal law—an antagonistic system. Fourthly, there is no more similarity between a right to bathe and a right to fish than between a right to kill wild animals not game and a right to exercise oneself on a man's close. A right of fishing in the sea, or a right of taking shell-fish, does not necessarily involve a right to cross a man's land, while a right to go across it to bathe does; and the only authority adduced, "that fishers who fish in the sea may justify their going upon the land adjoining to the sea, because such fishing is for the commonwealth and for the sustenance of all the kingdom" (Fitzh. Abr. Barre, 93; Y. B. 8 E. IV. 18, pl. 30, per Danby, C.J., at 19), makes it clear that there is a difference between the right to bathe and the right to fish, by the reason it gives for the goodness of the right of fishery; that it is for the commonwealth and for the sustenance of all the kingdom; a reason not applicable according to the ordinary use

Right of crossing land to bathe in the sea

denied by the King's Bench. Best, J.'s, dissent.

Hall, Essay on the Rights of the Crown in the Seashores of the Realm, supports Best, J.'s, dissent.

Reasons alleged considered.

highway.¹ The owners of a "roadside property," to adopt the term used by Wood, V.C., in *Attorney-General v. Conservators of the Thames*,² "have the public right of passing and repassing along the highway" possessed by all subjects of the realm who have occasion to use the highway; but they have, in addition to these public rights, a right to enter their houses from the highway,³ and "a reasonable right of access, they have a reasonable right of stopping, as well as of going and returning in the use of the highway."⁴ But, as was laid down by the King's Bench in *The King v. Russell*,⁵ "the primary object of the street was for

The King v. Russell.

Customes.

of language to a claim of a right to bathe. Further, this passage was interpreted by Holroyd, J., to refer to a particular custom; and in *Bro. Abr. Customes*, it appears that the doctrine laid down was on a question which arose upon a custom of drying nets. But, apart altogether from reasoning, the decision in *Blundell v. Catterall* exists, has been acted on, and is generally regarded as settling the law; which, did not the decision settle it, would probably have to be settled, as it is, on reasoning similar to that of the majority of the Court. In *Rex v. Crunden*, 2 Camp. 89, it was held to be an indictable offence for a man to undress on the beach and to bathe in the sea near inhabited houses from which he might be distinctly seen. This was followed in *The Queen v. Wellard*, 14 Q. B. D. 63. The Roman law is thus stated: *Littorum quoque usus publicus juris gentium est, sicut ipsius maris; et ob id quibuslibet liberum est casam ibi imponere, in qua se recipiant, sicut retia siccare et ex mare deducere. Proprietas autem eorum potest intellegi nullius esse, sed ejusdem juris esse, cujus et mare et quæ subjacent mari, terra vel harena.* Inst. 2, 1, 5. The Crown's right to the foreshore is traced to D. 43, 8, 3. *Littora in quæ populus Romanus imperium habet populi Romani esse arbitror* (Celsus).

¹ "It is well established law that, where there is a public highway, the owners of land adjoining thereto have a right to go upon the highway from any spot on their own land:" per Blackburn, J., *Marshall v. Ulleswater Steam Navigation Company*, L. R. 7 Q. B. 166, at 172; *Rose v. Groves*, 5 M. & G. 613; *Lyon v. Fishmongers' Company*, 1 App. Cas. 662, reversing the Court of Appeal, L. R. 10 Ch. 679; *Bourke v. Davis*, 44 Ch. D. 110. In the United States it has been held that the right of access of a riparian owner does not differ from that of the public at large, and that the Legislature may shut it off without making compensation; *Thayer v. New Bedford Railroad Company*, 125 Mass. 253.

² 1 H. & M. 1, at 32.

³ *Lyon v. Fishmongers' Company*, 1 App. Cas. 662, at 675; *North Shore Railway Company v. Pion*, 14 App. Cas. 612, at 619; *The Queen v. Metropolitan Board of Works*, L. R. 4 Q. B. 358, explained by Lord Chelmsford in *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243, at 258; *Rose v. Groves*, 5 M. & G. 613. As to the distinction between the right of access from a river to a riparian frontage and the right of navigation, see *Bell v. Corporation of Quebec*, 5 App. Cas. 84. There is no common law right to tow on the banks of ancient navigable rivers; *Ball v. Herbert*, 3 T. R. 253. Bracton, Lib. 1, c. 12, s. 6, says the law of England is identical with the Civil Law. His words are: *Riparum etiam usus publicus est de jure gentium sicut ipsius fluminis. Itaque naves ad eas applicare, funes arboribus ibi natis religare, onus aliquid in his reponere cui liberum est, sicuti per ipsum fluvium navigare; sed proprietas earum est illorum, quorum prædiis adhaerent.* Cp. Inst. 2, 1, 2-4. *Ripa ea putatur esse quæ plenissimum flumen continet*, D. 43, 12, 3, § 1. The ruling of Holt, C.J., at *Nisi Prius*, to the same effect in *Young v. —*, 1 Ld. Raym. 725, is rejected by Lord Kenyon, C.J., in *Ball v. Herbert*, where, also, the incongruity of Sir Matthew Hale's opinion in his *De Jure Maris*, Harg. Law Tracts, 85-87, that individuals had a right to a tow-path for towing vessels up and down rivers on making a reasonable compensation to the owner of the land for the damage, is exposed. *Horner v. Whitechapel Board of Works*, 55 L. J. Ch. 289, is the case of interference with access to a market.

⁴ *Original Hartlepool Collieries Company v. Gibb*, 5 Ch. D. 713, at 721; *Ramus v. Southend Local Board*, 67 L. T. 169.

⁵ (1805) 6 East 427, at 430. *Regina v. Chittenden*, the case of a traction engine, 15 Cox C. C. 725. See *Brown v. Eastern and Midlands Railway Company*, 22 Q. B. Div. 391, where a heap of rubbish was placed on defendants' land, the Court of Appeal held evidence admissible that many other horses than the plaintiff's had shied at it, with a view of shewing that it was a nuisance.

the free passage of the public, and anything that impeded that free passage without necessity was a nuisance. That, if the nature of the defendant's business (in the case before the Court, that of a waggoner) was such as to require the loading and unloading of so many more of his waggon than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot."

In *Rex v. Cross*,¹ which was the case of an indictment for causing *Rex v. Cross.* coaches to remain an unreasonable time in the public highway near Charing Cross, Lord Ellenborough reiterated this statement of the law, saying: "Every unauthorized obstruction of a highway, to the annoyance of the King's subjects, is an indictable offence. Upon the evidence given, I think the defendant ought clearly to be found guilty. The King's highway is not to be used as a stable-yard. It is immaterial how long the practice may have prevailed, for no length of time will legitimate a nuisance." And on the following day, in a subsequent case, he said:² "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house;—the public must submit to the inconvenience occasioned necessarily in repairing the house;³ but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon the subject is much neglected, and great advantages would arise from a strict and steady application of it. I cannot bring myself to doubt of the guilt of the present defendant. He is not to eke out the inconvenience of his own premises by

¹ 3 Camp. 224, at 227.

² *Rex v. Jones*, 3 Camp. 230, at 231; *Harris v. Mobbs*, 3 Ex. D. 268; *Wilkins v. Day*, 12 Q. B. D. 110.

³ *Herring v. Metropolitan Board of Works*, 19 C. B. N. S. 510. There is a custom in the City of London authorizing the Lord Mayor to license the erection of boardings during rebuilding for a reasonable time: *Bradbee v. Christ's Hospital*, 4 M. & G. 714; *Davey v. Warne*, 14 M. & W. 199—a ladder placed against a house for whitewashing is not a board. See The General Paving (Metropolis) Act, 1817 (57 Geo. III. c. xxix.), s. 75; and The Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 121–123; The Metropolis Management, &c., Amendment Act, 1882 (45 Vict. c. 14), s. 13; also Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 79 and 80; *Woodall v. Nuttall*, 8 Times L. R. 68, where the contention was that there was negligence in placing a boarding close to a tram line and not stopping the traffic; *Regina v. Commissioners of Sewers, Ex parte Brass*, 22 L. T. (N.S.) 582; *Hoare v. Kearley*, 1 Times L. R. 426, where Lord Coleridge, C.J., said: "The defendant in shoring up the house in question had done what had been a perfectly lawful act, as it had been sanctioned by the proper authorities, so that to be liable at the present action he must be shewn to have been clearly guilty of negligence," and see per Denman, C.J., *Rex v. Ward*, 4 A. & E. 384, at 404; and per Crompton, J., *Regina v. Justices of Richmond*, 2 L. T. (N. S.) 373.

taking in the public highway into his timber yard; and if the street be narrow, he must remove to a more commodious situation for carrying on his business."¹

The King v.
Moore.

The King v. Moore² was to the same effect. The obstruction was caused by a crowd collecting on the highway to watch pigeon-shooting on the defendant's enclosed grounds. "If a person," says Lord Tenterden, C.J., "collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable;" and in answer to the argument that the defendant was not liable for the collection of people whom it was not his intention to assemble, Littledale, J., points out that, though not the defendant's object to assemble a crowd, "if it be the *probable* consequence of his act, he is answerable as if it were his actual object."

Benjamin v.
Storr.

Benjamin v. Storr³ is very like these earlier cases. Access to plaintiff's premises was obstructed for an unreasonable time and in an unreasonable manner by the defendants loading and unloading goods into and from vans at their premises; so that the plaintiff's customers were prevented from coming to his shop, and he suffered a material diminution of trade. On proof of these facts an action was held maintainable on the ground that the plaintiff had sustained a particular damage, beyond the general damage to the public, and that such damage was direct and substantial. The case was argued and decided on the basis of its being a public nuisance, and private injury resulting therefrom, and on the authority of the cases of Iveson v. Moore⁴ and Winterbottom v. Lord Derby.⁵ The decision, moreover, could no less securely have been maintained on the principle approved by Lord Cairns, C., in Lyon v. Fishmongers' Company⁶—that interference with a private right is in itself a ground of action, even though it does not amount to a public nuisance accompanied by particular damage. The learned judge at the trial directed the jury to say whether or not the obstruction of the street was greater than was reasonable in point of time and manner, taking into consideration the interests of all

¹ By The Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), sec. 207, if any person "carelessly or accidentally break, throw down, or damage" any street lamp he is to pay the amount of damage done. Sec. 58 of 57 Geo. III. c. xxix., was limited to damage done "wilfully or carelessly." The existing liability arises apart from negligence, but is personal only, so that the master of a wrongdoing servant would not be liable: *Harding v. Barker*, 5 Times L. R. 42, 37 W. R. 78.

² 3 B. & Ad. 184, at 188.

³ (1874) L. R. 9 Q. B. 400. In *Mott v. Shoolbred*, L. R. 20 Eq. 22, where a public street was improperly used as a stable-yard, it was held by Jessel, M.R., that the nuisance to the neighbouring houses was not so permanent as to entitle a reversioner to an injunction.

⁴ 1 Ld. Raym. 486.

⁵ L. R. 2 Ex. 316.

⁶ 1 App. Cas. 662.

parties, and without unnecessary inconvenience ; telling them that they were not to consider solely what was convenient for the business of the defendants.

This question of what is reasonable must depend upon the circumstances ; with regard to them the observations of Jessel, M.R., in *Original Hartlepool Collieries Company v. Gibb*,¹ are strongly in point ; as, indeed, they also are with regard to the rights inherent in private property entitling to its reasonable enjoyment : “ You cannot lay down *a priori* what is reasonable. You must know all the circumstances. It would be clearly reasonable, for instance, if a wheel came off an omnibus in the middle of a highway, for a blacksmith to be sent for to put the wheel on the omnibus if that were the easiest mode of moving it out of the way, and the omnibus might lawfully stop there until the wheel was put on, in order to take it out of the way, if that were the best mode of taking it out of the way, and a reasonable and usual mode. Nobody would deny that if the blacksmith chose to carry on his trade of repairing omnibuses immediately opposite his own house, and for that purpose, not keeping any one omnibus more than a reasonable time for his work, he kept omnibuses opposite his house or shop, or smithy door for that purpose, that would be an obstruction of the highway, and would be a nuisance. You must look at the circumstances. So, again, it is perfectly reasonable that A shall put his carriage before his house door, even although it may overlap his neighbour’s door. For instance, take the houses which have been divided—houses in Portland Place—that is a familiar instance to me, and I dare say to most of us—where two doors immediately adjoin. It is impossible to draw up a carriage to the one without overlapping the other. There is no doubt that it is quite a reasonable thing to stop a carriage there for the purpose of taking up and setting down, or even for the purpose of waiting there a reasonable time. But suppose the neighbour’s carriage comes up and wants either to take up or to set down, it would be monstrous to hold that the coachman of the first carriage should not move out of the way. It would then become unreasonable. When he sees the neighbour’s carriage coming up, he is bound to get out of the way, and he *commits a private nuisance to his neighbour, in the nature of a public nuisance, by stopping before his door and preventing his coming up, he not requiring to stop there*. In that case, therefore, if he persisted in doing this day after day, I have no doubt that his neighbour might bring an action against him, and get, no doubt, nominal

Judgment of
Jessel, M.R.

¹ 5 Ch. D. 713, at 721.

damages; but nominal damages would establish the right and carry the costs." "In the same way it is not unreasonable that your neighbour should give an evening party occasionally, and that there should be a file of carriages running across your door or opposite your door. But it would be very unreasonable if anybody did not break the file to allow your carriage to come to your own door, and still more unreasonable if, instead of giving parties occasionally, as people do, your neighbour were to turn his house into an assembly room, or for some private purpose, in consequence of which a file of carriages came every day and obstructed the carriage-way to your house. I only give these as illustrations. The law is quite clear. The question of reasonableness has been said to be a question for a jury. It must be reasonable user and nothing else."¹

Fritz v.
Hobson.

The case of *Fritz v. Hobson*² was decided in strict accordance with these principles, although *Original Hartlepool Collieries Company v. Gibb*,³ was not referred to either during the argument or in the judgment. Defendant was engaged in building operations, to get to which there were three accesses—one down a narrow court, which was the most convenient, and which the defendant largely engrossed for the conveyance of building material, thus causing damage and loss to the plaintiff, who had a shop in the court. The defendant asserted "an unqualified and absolute right to approach the area of building operations which he was carrying on by the nearest road, to any extent, for any materials, for any time, and without regard to the plaintiff's convenience or inconvenience."⁴ Fry, J., negatived this claim, on the ground, first, that the private right of the owner of a house adjoining a highway to access from his house to the highway must not be interfered with by an unreasonable use of the highway; and, secondly, on the ground of the decision in *Benjamin v. Storr*,⁵ that there was a public nuisance, with particular, direct, and substantial damage to a private individual.

Regina v.
Mathias.

In *Regina v. Mathias*,⁶ the head note is that "the use of a public footway includes that of a perambulator as a usual accompaniment of a large class of foot-passengers, if of a size and weight not to inconvenience other passengers, and not to injure the soil," but the report of Byles, J.'s, direction to the jury does

¹ See per Lord Cranworth, C., in *Att.-Gen. v. Sheffield Gas Consumers' Company*, 3 De G. M. & G. 304, at 339, where the law is laid down in the same manner, and with almost identical illustrations.

² 14 Ch. D. 542.

³ 5 Ch. D. 713. See *Bell v. Corporation of Quebec*, 5 App. Cas. 84.

⁴ 14 Ch. D. 542, at 552.

⁵ L. R. 9 C. P. 400.

⁶ 2 F. & F. 570.

not go nearly so far. In it the learned judge is reported to have said: "There might be many things on a footway which ought not to be there, but not being nuisances, interfering with the convenient use of the way by passengers, one of the public would have no right to remove. If you should think that this perambulator ought not to have been there, but that it did not amount to a nuisance to the way, the defendant, as one of the public, had no right to remove it." "My direction to you is, that the owner of the soil may remove anything that encumbers his close, except such things as are usual accompaniments of a large class of foot-passengers, being so small and light as neither to be a nuisance to other passengers nor injurious to the soil." "If you are of opinion that this perambulator comes within the description of the things as to which I have just directed you, you will find for the prosecution; if not, for the defendant."

Wood, V.C., was of opinion, in *Walker v. Brewster*,¹ that the collecting a crowd is fully established to be a nuisance in law; and "in the neighbourhood of a populous town the letting off fireworks and performance of powerful bands will collect together crowds as a necessary and not merely a probable consequence," and so *a fortiori* is a nuisance. *Walker v. Brewster.*

Walker v. Brewster was distinguished in *Inchbald v. Robinson*² —the case of a performance at a circus creating a nuisance to neighbouring houses—on the ground that the nuisance therein was an outdoor performance where people would assemble outside the ground; while in *Inchbald v. Barrington* the nuisance arose from the performance itself. "The plaintiff," said Selwyn, L.J., "cannot complain of the temporary crowding occasioned by people going to the circus or leaving it; and no such continuous crowding is shown as to justify the interference of the Court." In *Barber v. Penley*,³ North, J., gave judgment on the ground that "it is not here a coming to and going from that is complained of; it is the nuisance caused by those who intend ultimately to get into the theatre collecting in the street outside the theatre and remaining there, which is quite a different thing from coming to or going from it."⁴ With regard to the distinction between outdoor and indoor performances, the learned judge added: "If a defendant does within his premises what causes a nuisance outside, it does not matter whether the nuisance is caused by" *Inchbald v. Robinson.*
Barber v. Penley.

¹ L. R. 5 Eq. 25, at 34.

² L. R. 4 Ch. 388, at 396.

³ (1893) 2 Ch. 447, at 457, *Wagstaff v. The Edison Bell Phonograph Corporation, Limited*, 10 Times L. R. 80.

⁴ Cp. *Jenkins v. Jackson*, 40 Ch. D. 71. See as to a subsequent stage of this case (1891), 1 Ch. 89.

what goes on inside being actually visible outside and so causing the crowd to collect, or whether, by reason of what is going on or what is about to go on inside, he causes the crowd to collect. It seems to me the principle of both is the same, though the application is different."¹

It is obvious from what Selwyn and Giffard, L.JJ., say in *Inchbald v. Robinson*, that a crowd going to or leaving a circus may collect and continue in such circumstances and numbers as to create a nuisance. But the evidence necessary to prove such would probably have to be greater than where the crowd collected for some less justifiable purpose.

Harris v.
Mobbs and
Wilkins v.
Day.

There remain two cases, *Harris v. Mobbs*² and *Wilkins v. Day*,³ very similar in their facts. In each of these an obstruction was left on the roadside, but not (except to the extent of a few inches in one case) on the metalled part; and in each the person authorizing the placing the obstruction was held liable to a person who sustained particular damage, on the ground that "in the case of an ordinary highway, although it may be of a varying and unequal width, running between fences on each side, the right of passage or way *prima facie*, unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the entire of it as a highway, and are not confined to the part which may be metalled or kept in repair for the more convenient use of carriages and foot-passengers."⁴

Rights of
owner of house
or land which
abuts on a
highway.

The right of one having house or land abutting on a highway to pass from one to the other is, on the authorities,⁵ beyond question. If he is also the owner of the soil of the highway

¹ See *Bellamy v. Wells*, 39 W. R. 158.

² (1878) 3 Ex. D. 268; reported on motion for judgment before Denman, J., 27 W. R. 154.

³ (1883) 12 Q. B. D. 110.

⁴ Per Martin, B., summing up in *Regina v. The United Kingdom Electric Telegraph Company (Limited)*, 9 Cox C. C. 137, at 144, and adopted by Crompton, J., delivering the considered judgment of the Queen's Bench on motion for a new trial, *Regina v. United Kingdom Electric Telegraph Company (Limited)*, 9 Cox C. C. 174, at 176, where the cases are collected. *Regina v. Train*, 9 Cox C. C. 180; *Coverdale v. Charlton*, 4 Q. B. D. 104, explained by James, L.J., in *Rolls v. Vestry of St. George, Southwark*, 14 Ch. Div. 785, to mean "that the Board had only the surface, and with the surface such right below the surface as was essential to the maintenance and occupation and exclusive possession of the street, and the making and maintaining of the street for the use of the public;" *Wandsworth District Board of Works v. United Telephone Company*, 13 Q. B. D. 904; *Turner v. Ringwood Highway Board*, L. R. 9 Eq. 418; *Nicol v. Beaumont*, 53 L. J. Ch. 853; *Fareham Local Board v. Smith*, 7 Times L. R. 443; *Baird v. The Corporation of Tunbridge Wells*, 10 Times L. R. 378 (C. A.). See the cases collected in the American case, *M'Cormick v. District of Columbia*, 54 Am. R. 284, and note at 290; and *Pierce v. Drew*, 136 Mass. 75, 49 Am. R. 7, and note at 14; *Robbins v. Jones*, 15 C. B. N. S. 221, at 243; and the statement of Willes, J., in *Hinde v. Chorlton*, L. R. 2 C. P. 104, at 116. As to road scrapings left by side of highway, and the liability of a corporation for the same, *Nelson v. County Council of Lower Ward of Lanark*, 19 Rettie 311.

⁵ *Lyon v. Fishmongers' Company*, 1 App. Cas. 662, at 676, *ante*, 410.

apart from statutory interference with his rights, he is entitled to prevent any alteration being made in the level of the highway.¹ If he is not the owner of the soil of the highway, his right of passage becomes merely a consequence of the dedication of the highway to the public. If, then, the dedication of the highway is at a certain level, the house- or land-owner abutting on the highway has a right of access at that level, so long as it is preserved, equally with the rest of the public. In the case of the subsidence of the highway, since he has no right to the maintenance of any particular level, he has no right to have the road maintained at the sunk level, and consequently no right of his is infringed if the road is raised to the height it was previously to the subsidence.² “Supposing,” says Bramwell, L.J.,³ “that the owner of property adjoining a highway is not the owner of the soil in the highway, I do not think that he has any right by the law of the land, to have the road continued at a particular level. It may be a great inconvenience to him to have the road altered, if he has built with reference to the level of the road; but it may be an inconvenience to the public not to have the level altered, and I do not know that he has any vested right in the road remaining at that level to the inconvenience of all mankind.”

Bramwell,
L.J.'s, state-
ment of the
law.

The right to the enjoyment of the whole width of a highway, we have just seen, is not absolute, but *prima facie* only. It remains to consider in what respect this *prima facie* right may be limited. The general rule of law applicable is laid down by Blackburn, J., in the leading cases of *Fisher v. Prowse* and *Cooper v. Walker*,⁴ “which explained and overruled several out of which vague notions of liability have sprung up:” “The law is clear that if, after a highway exists, anything be newly made so near to it as to be dangerous to those using the highway—such, for instance, as an excavation, *Barnes v. Ward*⁵—this will be unlawful and a nuisance; as it also is if an ancient erection, as a house, is suffered to become ruinous, so as to be dangerous, *Regina v. Watts*;⁶ and those who make or maintain the nuisance in either case are liable for any damage sustained thereby, just as

How the *prima facie* right to the width of the whole road may be limited.

Fisher v. Prowse.

¹ *Goodson v. Richardson*, L. R. 9 Ch. 221. As to compensation for an interference with the level of a street, see *The Queen v. The Wallasey Local Board of Health*, L. R. 4 Q. B. 351; the point as to the ownership of the soil does not appear to have arisen. *Sellors v. Matlock Bath Local Board*, 14 Q. B. D. 928; *Milward v. Redditch Local Board*, 21 W. R. 429.

² *Burgess v. Northwich Local Board*, 6 Q. B. D. 264.

³ *Nutter v. Accrington Local Board*, 4 Q. B. Div. 375, at 388.

⁴ 2 B. & S. 770, at 779; *Mercer v. Woodgate*, L. R. 5 Q. B. 26. *Arnold v. Blaker*, in Ex. Ch. L. R. 6 Q. B. 433, lays down the law as to a limited dedication of a highway; see further *Arnold v. Holbrook*, L. R. 8 Q. B. 96.

⁵ 9 C. B. 392.

⁶ 1 Salk. 357.

much as if the nuisance arose from an obstruction in the highway itself; but the question still remains, whether an erection or excavation already existing, and not otherwise unlawful, becomes unlawful when the land on which it exists, or to which it is immediately contiguous, is dedicated to the public as a way, if the erection prevents the way from being so convenient and safe as it otherwise would be; or whether, on the contrary, the dedication must not be taken to be made to the public, and accepted by them subject to the inconvenience or risk arising from the existing state of things. We think the latter is the correct view of the law. It is, of course, not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions, and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter that state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention."

Robbins v.
Jones.

The greater part of this passage just extracted was incorporated in the judgment in *Robbins v. Jones*¹—"The Waterloo Bridge Case." By reason of the construction of the bridge, a high causeway was made as an approach, raising the level of the roadway considerably above the old road. A row of houses stood on the original level of the ground, running parallel to the causeway and road leading to the bridge, but leaving a space of more than seven feet between the houses and the retaining wall of the causeway. In consequence of the construction of the causeway, the houses were divided into two distinct dwellings; having one door opening upon the causeway, and connected with it by flagstones resting at one end upon the walls of the houses, and on the other upon the retaining wall of the causeway, and having at intervals gratings fastened into the flags; the whole formed one continuous footway, which had become dedicated to the public, and was used as a part of the highway for foot-passengers. The door of the lower portion opened on the old road. A crowd having collected on the flagstones and grating, a portion gave way, and about thirty persons were thrown down to the lower level

¹ (1863) 15 C. B. N. S. 221.

The plaintiff's husband was killed, and she brought an action against the owner, who had under-let. The judgment, though delivered by Erle, C.J., was prepared by Willis, J.¹ (who presided at the trial), and establishes nine propositions, as follows : Propositions
of Willes, J.

1. If the flagstones and grating are considered a private way to the houses, the reversioner is not liable, but the occupier.²

2. If they constitute a public way, then the gap between the houses and the retaining wall of the causeway was not made by the defendant, but was coeval with and a consequence of the construction of the way.³

3. If they constitute a public way, the public has to repair, since the liability is attached to the public user, not to the *quantum* of benefit attaching to the frontage. The benefit was retained by the proprietor, not conferred on him.

4. The flagging and grating were not used by the occupier of the house otherwise than as one of the public, and were therefore not repairable by him.

5. The more or less artificial character of the flagging or grating did not make it more or less a way to be repaired by the parish.⁴ "Whether it be stone, iron, wood, or composition, as it is a public way, the public are to keep it in repair, and not the person who dedicated it."

¹ 15 C. B. N. S. at 223.

² "A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumbledown house, and the tenant's remedy is upon the contract, if any. In this case there was none, not that that circumstance makes any difference in our opinion:" 15 C. B. N. S. 221, at 240. Cp. *Cole v. McKey*, 57 Am. R. 293. *Coupland v. Hardingham*, 3 Camp. 398, first, was the case of a hole *adjoining* a highway; secondly, was a *nuisance*; and therefore it was the duty of the occupier to fence it. "If the landlord at the time of the demise knows of the defect, and does nothing to cause it to be remedied, he may be liable too. But I doubt very much whether, if the burthen of repair is cast upon the tenant, the duty of the landlord does not altogether cease:" per Brett, J., *Gwinnell v. Eamer*, L. R. 10 C. P. 658, at 661.

³ In *Barnes v. Ward*, 9 C. B. 392, the hole was made by defendant. The circumstances of America have brought the liability of the road authority to guard against dangers adjoining the highway to a greater extent than that of the adjoining owner. Thus Gray, C.J., in *Puffer v. Inhabitants of Orange*, 122 Mass. 389, at 391, says: "A town is bound to erect barriers or railings where a dangerous place is in such close proximity to the highway as to make travelling on the highway unsafe. But it is not bound to do so, to prevent travellers from straying from the highway, although there is a dangerous place at some distance from the highway, which they may reach by so straying." And in *Warner v. Holyoke*, 112 Mass. 362, at 367, it is said: "The law has nowhere undertaken to define at what distance in feet and inches a dangerous place must be from the highway in order to cease to be in close proximity to it. It must necessarily be a practical question to be decided by the good sense and experience of the jury." In another case (*Drew v. Town of Sutton*, 45 Am. R. 644) the law is laid down to be that the injured person is to shew that the defect that caused the injury existed either in the highway, or so near to it as to make it dangerous to travel on the highway itself. We thus see that the law in America as against highway authorities is the same as in England against adjoining owners. In England the local authority would not be liable for the nonfeasance; *Cowley v. Newmarket Local Board* (1892), App. Cas. 345.

⁴ "The exceptions to the liability of the parish have been known. They are custom, prescription, tenure, and inclosure while it lasts. Have we authority to add flagging and grating?" 15 C. B. N. S. 221, at 241.

6. A cellar flap differs because it is worn out for the benefit of the occupier of the cellar to which it is the door, and it "may be considered as a trap in its nature and essence, unless it be kept shut."

7. A ruinous building adjoining a highway differs, because what is insufficient here is part of the highway itself.¹

8. A concealed danger differs, because—

- (a) The existence of the gap must have been known to all passers;
- (b) It would not have been a danger had the parish maintained and repaired the flagging and grating;
- (c) The defendant did not erect, and, as it was a highway, could not have removed, the structure; and
- (d) In the absence of fraud a highway may be dedicated with a dangerous obstruction on it; *e.g.*, in *Fisher v. Prowse*.

9. The grant of a way casts on the grantee, and not on the grantor, the duty to maintain and repair, with a right to enter on the grantor's land to do all acts necessary for the maintenance and repair of it.²

Subject to the right of passage, the ownership of a highway remains unaffected.

The *prima facie* right of the public to use the whole width of a highway is further limited to the right of passage over it, and the owner continues in the possession of all other rights of ownership not inconsistent therewith.³ This is clearly

¹ *E.g.*, there is a power to remove the building, but not the highway. See *Hamilton v. Vestry of St. George, Hanover Square*, L. R. 9 Q. B. 42; the judgment in which is identical with the case put in *Robbins v. Jones*, 15 C. B. N. S. 221, at 242: "We may refer, by way of illustration only, to the case of one of the squares, where the footway on one side consists of large flags reaching from the outer wall of the area to the outer wall of the cellar. There the upper part of the flags forms the way, and the lower part of the same flags forms, as we are told, the ceiling of the cellar. Who is to maintain and repair the flagged way? We apprehend the public, who walk upon it and wear it out, without which it might last an indefinite time." See also *Moore v. Lambeth Waterworks Company*, 17 Q. B. Div. 462. In *Warner v. Wandsworth District Board of Works*, 53 J. P. 471, plaintiff, while driving along a road, passed under a bridge whose entrance was higher than its exit, and his head coming into contact with the bridge he sustained injury, but he was held disentitled to recover on proof that the bridge was in the same condition when it was dedicated.

² The authorities are collected Gale, *Law of Easements* (Gibbon's, 5th ed.), 528 *et seqq.*, citing, *inter alia*, *Pomfret v. Rycroft*, 1 Wms. Saund. 322 a; 1 Notes to Saunders, 566; "by common law, he who has the use of a thing ought to repair it," *Taylor v. Whitehead*, 2 Doug. 745, per Lord Mansfield, at 749; *Bell v. Twentymen*, 1 Q. B. 766; *Lord Egremont v. Pulman, M. & M.* 404. See also *Colebeck v. Girdlers' Company*, 1 Q. B. D. 234; and *Corporation of London v. Riggs*, 13 Ch. D. 798, where the limitation to a way of necessity was stated to be that it was to be only such a way as will enable the owner of the close to enjoy it in its then state at the time of the grant of the enclosing land, and not as a right of way for all purposes. As to "way of necessity," 3 Kent, Comm. (13th ed.) 424 *cum notis*.

³ In the *King v. Russell*, 6 B. & C. 566, the judge at the trial charged the jury that if they thought an erection on a highway—in this case the River Tyne—was for a public purpose and produced a public benefit, and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river, they should acquit the defendants. On motion for a new trial, Holroyd, J., was of opinion

shewn by Vestry of St. Mary, Newington *v.* Jacobs.¹ The respondent was the owner of premises contiguous to Newington Causeway, to whom the vestry had refused permission to take up the flags and make a proper paved carriage-way across the side

Vestry of
St. Mary,
Newington, *v.*
Jacobs.

the direction was good, and Bayley, J., who tried the case, adhered to the opinion he had expressed to the jury at the trial: but Lord Tenterden, C.J., dissented. In *The King v. Ward*, 4 A. & E. 384, the Queen's Bench unanimously, and with the concurrence of Littledale, J., who had refrained from the previous decision, dissented from *The King v. Russell*, which had been previously reflected on in *The King v. Pease*, 4 B. & Ad. 30. In *Welsh v. Wilson*, 101 N. Y. 254, 54 Am. R. 698, defendant, for the purpose of removing merchandise from his store in the city of New York, laid skids from a truck across the sidewalk to the steps. Plaintiff attempted to pass round them, but fell and was injured. Judgment having been given for defendant, was affirmed on appeal, Earl, J., saying: "The defendant had the right to place the skids across the sidewalk temporarily for the purpose of removing the cases of merchandise. Every one doing business along a street, in a populous city, must have such a right, to be exercised in a reasonable manner so as not to unnecessarily incumber and obstruct the sidewalk. When the plaintiff found this obstruction in her pathway, she had the option either to wait a couple of minutes, or to cross the street and pass upon the other sidewalk, or to pass round the truck in the street, or to take the way she selected. The defendant was under no obligation to furnish her a safe passage way around the obstruction." This case was quoted in the later case of *Jochem v. Robinson*, 57 Am. R. 298, where the leading English cases were also cited and approved. In the judgment, which was on facts not dissimilar from those in the case just cited, it was said: "The primary object of a public street in a city is for public travel. The same is true of a public sidewalk. Neither may be always wholly restricted to such use. Business men and their employees must have access to and from their places of business, and so must their customers. Dealers, and especially wholesale dealers, in the crowded portion of a great city, as here, must moreover have an opportunity for receiving and shipping goods more or less bulky and ponderous, and often in the original packages. Such reception and shipment of goods must necessarily at times more or less hinder or obstruct travel upon public sidewalks and even upon public streets. The right to so hinder or obstruct is by no means absolute or continuous. It is at most temporary. It depends upon the necessity, and the necessity may depend upon the size and weight of the packages handled, the duration of the obstruction, and perhaps other circumstances. 'This necessity need not be absolute; it is enough if it be reasonable.' If the law required an absolute necessity, but few could escape liability." "It follows from what has been said that whenever such dealer so hinders or obstructs public travel upon such sidewalk or street, he thereby takes upon himself the burden of shewing the obstruction to have been reasonably necessary and temporary. Failing to do so, he is responsible for any injury therefrom to a traveller upon such street or sidewalk in the exercise of ordinary care." The authorities cited in the above judgment have been omitted from the quotation. See also as to the right to load and unload, *Callanan v. Gilman*, 107 N. Y. 360, where the cases are collected. Lord Coleridge, C.J., in *Watson v. Ellis*, 1 Times L. R. 317, does not seem fully to have apprehended that there is a right to use the footpath for loading and unloading. There he appears to have thought that the putting a carpet on the highway was at the peril of the householder; but *quære* had he not a right to put it there, subject to the duty of taking it up after it had been used by his visitor, and putting it down on the arrival of the next; so that there should be no needless interference with the right of passage;—if not in Smithfield Market, yet in Grosvenor Square; see *per Pollock, C.B., Bamford v. Turnley*, 3 B. & S. 62, at 79. Vestry of St. Mary, Newington *v.* Jacobs, L. R. 7 Q. B. 47, cited in the text; and *per Jessel, M.R., Original Hartlepool Collieries Company v. Gibb*, 5 Ch. D. 713, at 721. In the subsequent and similar case of *De Teyron v. Waring*, 1 Times L. R. 414, Lord Coleridge, C.J., reiterated his statement of the law, in *Watson v. Ellis*, with additional emphasis, "the laying down the matting [on the pavement] was unlawful, as it was an obstruction to the highway, and, if it caused any injury to a passenger, it was actionable," a man while walking along the street "might if he pleased look up at the stars as he walked, and his doing so was not contributory negligence, which should preclude him from recovering." Lord Coleridge probably had in his mind the lines:

Right to load
and unload
merchandise
across the
footpath.

Right of
householder to
put down
carpet across
the pavement.

*Os homini sublime dedit; cælumque videre
Jussit, et erectos ad sidera tollere vultus.*

Metamorph. lib. i. 85.

¹ L. R. 7 Q. B. 47.

pavement to his premises, which premises he was in the habit of using for storing up machinery of a very heavy kind. The respondent was accustomed to convey the machinery across the flagged footway by means of rollers and levers; but this method was objected to as an obstruction of the thoroughfare; thereupon he conveyed his machinery to and from his premises in trolleys or waggons: the result was to break the flags through the extraordinary weight of the machinery. He was then summoned, under The Highway Act 1835,¹ s. 73, for causing injury or damage to be done to the highway. The magistrate considered that the injury or damage was not wilfully done to the highway; that the freehold property in question could not be reasonably enjoyed without access across the existing footway; and that the rights of ownership and of the public might be jointly exercised there quite consistently with the general welfare; he, therefore, dismissed the summons. On appeal there was judgment for the respondent, on the ground that "the owner who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith; and the appropriation made to and adopted by the public, of a part of the street to one kind of passage, and another part to another, does not deprive him of any rights as owner of the land, which are not inconsistent with the right of passage by the public."²

Decision in
accordance
with the old
law.

This is merely a statement of what has, with one doubtful exception,³ always been regarded as the law. Thus, as early as Rolle's Abridgement⁴ (*circa* 1660) it is distinctly laid down with regard to a highway that the King has nothing but the passage for himself and his people, but the freehold and all profits belong to the owner of the soil. And Lord Mansfield, in giving judg-

It would be rash to generalize even from this that such an Ovidian occupation could, in all circumstances, be pursued at the risk of those having stumbling-blocks along the way. The author was in a Court (a Divisional Court) when a learned Queen's counsel absolutely refused *even to argue* that a tradesman has any rights, as against an injured person, to load or unload goods from his premises, across the highway, on any other terms than such as identify his position with that of an obstructor. The Court apparently approved the course taken. Every consideration, however, of law, authority, and convenience seems distinctly the other way. See, in addition to the cases cited above, *Vallo v. United States Express Company*, 147 Pa. St. 404, 30 Am. St. R. 741. As to obstructions by tramcars: *Pittsburgh Southern Railway Company v. Taylor*, 104 Pa. St. 306, 49 Am. R. 580; *Mahady v. Bushwick Railroad Company*, 91 N. Y. 148, 43 Am. R. 661.

¹ 5 & 6 Will. IV. c. 50.

² The point does not appear to have been taken in *Lee v. Nixey*, 63 L. T. 285.

³ *Welladvised v. Foss*, in 8 Geo. II., cited in *Goodtitle v. Alker*, 1 Burr. 140, but denied by Lord Mansfield, at 143, to be an authority.

⁴ *Chimin Private* (B), A que le soile, et les choses sur ceo appartient. En un hault chemin le roy nad auter forsque le passage pur lui et ses people. Cp. Y. B. 8 E. IV. 9, pl. 7; Y. B. 2 E. IV. 9, pl. 21.

ment in *Goodtitle v. Alker and Elmes*,¹ where the question was whether ejectment would lie by the owner of the soil for land which is subject to passage over it as the King's highway, says: "It [*i.e.*, the highway] is like the property in a market or fair. There is no reason why he [the owner] should not have a right to all remedies for the freehold, subject still, indeed, to the servitude or easement. An assize would lie if he should be disseised of it; an action of trespass would lie for an injury done to it." Again, in *Cattle v. Stockton Waterworks Company, Blackburn, J.*, speaking of the right of the owner of the soil to deal with a highway, says:² "This, as owner of the soil, he had a perfect right to do, provided he did not interfere with the road above him," or the defendants' right acquired under their act to keep their pipes there."

Goodtitle v. Alker: judgment of Lord Mansfield, C.J.

Cattle v. Stockton Waterworks Company.

There is another limitation of a highway authority's user of a highway, and that is where there are statutory powers of laying pipes conferred on some other body, most often a gas or water company. It was contended by various highway authorities that, despite the presence of pipes in the soil of the highway that might be seriously injured by various methods of repairing the highway that the highway authority might see fit to adopt, it was their right and duty to repair the roads in what was, in their view, the most economical and best way, and to avail themselves of all improvements, regardless of their effects on such pipes or sub-soil constructions. This pretension was, however, negatived by the Court of Appeal in *Gas Light and Coke Company v. Vestry of St. Mary Abbots, Kensington*,⁴ where the principles governing these cases were summed up by Lindley, L.J., in two propositions:

Statutory limitation of highway authority's user.

Gas Light and Coke Company v. Vestry of St. Mary Abbots, Kensington.

Propositions by Lindley, L.J.

1. The right of gas and water companies to lay their pipes and have them uninjured is subordinate to the right of the public to use the streets and to have them kept in repair.

2. The statutory right of gas and water companies to lay their pipes under a highway imposes on the highway authority a duty to repair their highways only in such a manner as shall not injure the pipes authorized by statute so caused to be placed.

To constitute an obstruction it is not necessary there should be an actual physical impediment, but, "if a place is situate near a highway, and the defendant do that which causes the persons

Obstruction is not restricted to the placing a physical impediment on a highway.

¹ 1 Burr. 133, at 143; see per Kay, L.J., *Harrison v. Duke of Rutland* (1893), 1 Q. B. 142, at 155.

² L. R. 10 Q. B. 453, at 455. Cp. Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 54.

³ See *Goodson v. Richardson*, L. R. 9 Ch. 221, alluding to the special work in the case mentioned.

⁴ 15 Q. B. D. 1.

passing to be prevented from passing as they ought to do, and, besides this, people are annoyed in the occupation of their houses, this is a nuisance, for which the party is indictable." The law was thus laid down by Park, J., in *Rex v. Carlile*,¹ where defendant exhibited two scandalous and libellous pictures in a shop window in Fleet Street, whereby the highway was greatly obstructed, to the common nuisance. In the same summing-up the same learned judge is reported to have said: "There is no doubt that a tradesman may expose his wares for sale; but he must do it in such a way as not by so doing to cause obstruction in the public streets."

Rex v. Carlile.

Summing-up
by Park, J.

Display of
wares in a
shop.

That there is a point beyond which the exposure of wares for sale in a shop window would amount to an indictable nuisance may be admitted; although it is not conceivable that any interference with the public convenience, caused merely by the display of wares for *bonâ fide* sale in a shop window, or by any ordinary arts of attracting public attention with a view to secure a market for goods, or, again, by any temporary rush of customers intent to supply themselves with some attractive novelty, would subject the tradesman displaying his goods or merchandise to the penalties of the law, because they prove so attractive as to command an unusual share of attention and admiration. Perhaps the best security for the equal enjoyment of the rights of the public and the rights of the shopkeepers lining the highway is the recognition of a definite rule of law forbidding any engrossing of any part of the public highway, yet which is only enforced in those flagrant cases where the public rights are not merely infringed upon, but positively outraged.

Costermongers
and stall-
keepers.

The user by costermongers and stallkeepers of the sides of highways for the carrying on of their business at common law is an infringement of the public rights. Any costermonger placing goods on the highway for a period longer than necessary to load or unload, may be indicted for a nuisance for his offence against the public, or be made defendant to an action by any private person whom he specially injures. The highway is for the passage to and fro of all her Majesty's subjects. No one has a right to engross any portion of it. Every passenger has a right to the whole width of it, subject only to the equal right of every other passenger. The common law has, however, been infringed upon by various special Acts in some cases, for the more readily vindicating public rights, and, in the case of costermongers, for the conferring exceptional privileges.

¹ 6 C. & P. 636, at 648. See Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), ss. 52, 54, sub-s. 9; Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 21.

Michael Angelo Taylor's Act,¹ the Metropolitan Police Act,² the Metropolitan Streets Act,³ and the Town Police Clauses Act, 1847,⁴ give summary means for enforcing a very vigorous control over highways in urban districts.

¹ The General Paving (Metropolis) Act, 1817 (57 Geo. III. c. xxix.), ss. 64, 65, 66. *Summers v. Holborn District Board of Works* (1893), 1 Q. B. 612, decides that while costermongers carry on their business in accordance with regulations made under 31 Vict. c. 5, s. 1 (The Metropolitan Streets Act Amendment Act, 1867), they are exempt from the provisions of 57 Geo. III. c. xxix. ss. 64, 65, 66 relating to street obstructions. Lord Coleridge goes even further, and seems to regard The Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), as "inconsistent" with the provisions of sec. 65 of the earlier Act. This opinion is apparently based on the principle of interpretation followed in *Fortescue v. Vestry of St. Matthew, Bethnal Green* (1891), 2 Q. B. 170. It, however, overlooks the considerations that, in that case, the same authority was entrusted with carrying out the provisions of both Acts, whereof the latter excluded the rights allowed under the former. In Summer's case, on the contrary, different authorities carry out each Act; while the absence of contradiction between the provisions of the two is shown by the fact that for ten years previous to the decision in Summer's case, the police acted under a Police Order of 17th April, 1882, by which "obstructions or inconvenience to the passage of the public by the habitual practice of depositing on the footways, or other part of the street, things for sale," is left to be dealt with by the local authority under the powers conferred by 57 Geo. III. c. xxix.; while the like *contemporanea expositio* limits the scope of police intervention to dealing with casual or actual obstruction, in short, with traffic regulation. Local needs were dealt with by the local authority—the vestry, while general regulative duties were discharged by the police. The scope of sec. 65 of 57 Geo. III. c. xxix., is indicated by *Wyatt v. Gems* (1893), 2 Q. B. 225. *Gosling v. Green* (1893), 1 Q. B. 109, has a distinct bearing on Lord Coleridge's views on "inconsistency."

What constitutes "inconsistency" so as to work the repeal of one of two apparently coexisting provisions, is a matter of such importance in this and other connections, as to excuse a note. "Repeal by implication is never to be favoured," per Field, J., *Dobbs v. Grand Junction Waterworks Company*, 9 Q. B. D. 151, at 158. The repugnancy between the new provision and a former statute must not only be plain, but also unavoidable; *Foster's Case*, 11 Co. Rep. 56 b, 63 a, 1 Roll. Rep. 89, at 91; *Thornby v. The Duchess of Hamilton v. Fleetwood*, 10 Mod. 114, at 118 *arguendo*; *Bacon, Abr. Statute D.* See also *Cope v. Cope*, 137 U.S. (30 Davis) 682, at 686. Where two sections in conflict are found in one Act, the rule is "the general enactment must be taken to affect only the other parts of the statute to which it may properly apply," *Pretty v. Solly*, 26 Beav. 606, per Romilly, M.R., at 610, and per the same judge, *De Winton v. Brecon*, 28 L. J. Ch. 600, at 604; see also, per Best, C.J., *Churchill v. Crease*, 5 Bing. 177, at 180. The rule, where two Acts are to be read together, is the same as when various provisions occur in the same Act, "unless there is some manifest discrepancy making it necessary to hold that the later Act has to some extent modified something found in the earlier Act;" per Lord Selborne, *Canada Southern Railroad Company v. International Bridge Company*, 8 App. Cas. 723, at 727. "The test of whether there has been a repeal by implication by subsequent legislation," says Smith, J., *Churchwardens, &c., of West Ham v. Fourth City Mutual Building Society* (1892), 1 Q. B. 654, at 658, "is this: Are the provisions of a later Act so inconsistent with or repugnant to the provisions of an earlier Act that the two cannot stand together?"

This inconsistency then is not to be determined by mere pronouncement, judicial or other, but is to be arrived at by the application of rules of law. For example, the maxim *generalia specialibus non derogant* is to be regarded. "Now, if anything," says Lord Selborne, C., *Seward v. Vera Cruz* (1884), 10 App. Cas. 59, at 68, "is certain it is this, that where there are general words in a later Act capable of reasonable and sensible application, without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation, indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so." In the earlier case of *Garnett v. Bradley* (1878), 3 App. Cas. 944, at 950, Lord Hatherley had thus stated the rule: "An Act directed

¹ 2 & 3 Vict. c. 47, s. 54, sub.-s. 6. Under sec. 72 of The Highway Act, 1835 (5 & 6 Will. IV. c. 50), the police can prosecute for obstructing a highway within the Metropolitan area. *Back v. Holmes*, 57 L.J.M.C. 37.

² 30 & 31 Vict. c. 134, s. 6.

³ 10 & 11 Vict. c. 89, s. 28.

By the Metropolitan Streets Act (Amendment) Act, 1867,¹ however, costermongers and stallkeepers in the London district are, by a beneficent interpretation of the special legislation applicable, exempted from all interference, so long as they conform to the police regulations made under the Act. So soon as the regulations are transgressed the general law is once more applicable to them.²

Obstruction an individual as well as a joint act.

In some of the costermongers' cases it has been contended that the obstruction caused is not by the barrow of the person proceeded against, but by reason of other costermongers, each conforming to the police regulations, congregating round him; and that in these

towards a special object, or special class of objects, will not be repealed by a subsequent general Act, embracing in its generality those particular objects, unless some reference be made directly or by necessary inference to the preceding Act." For instances of the working of this principle, see *Rex v. Poor Law Commissioners*, 6 A. & E. 1; *London v. Blackwall Railway Company v. Limehouse*, 3 K. & J. 123; *Thorpe v. Adams*, L. R. 6 C. P. 125; *Taylor v. Corporation of Oldham*, 4 Ch. D. 395, at 410. The same learned Lord had previously, in *Green v. The Queen*, 1 App. Cas. 513, at 546, said: "A well-known passage from Lord Coke has been cited by Mr. Justice Quain, namely, that you are not to do away with existing special rights by general affirmative words. But if the affirmative words are clear, plain, and precise, and the two things will not coexist, or stand together, then I apprehend you are compelled to come to a construction, which is a sensible construction in itself, and also a natural and ordinary construction. Finding that the two things will not stand together, you are compelled to adopt that construction which the plain sense of the words require." "If," says Kay, L.J., in *Millington v. Harwood* (1892), 2 Q. B. 166, at 172, "a subsequent Act does not in terms repeal a previous Act, and does not expressly refer to that Act, we must find such an inconsistency that the two Acts cannot be read together." This principle of law was firmly established so far back as 1577; as may be seen from a report to Sir Walter Mildmay by Mr. Justice Manwood of the opinion of the judges on the construction of certain of the Popery Acts, printed as a note in Froude, *History of England*, vol. xi., 88. It is nowhere more aptly stated than by Pratt, C.J., in *Chapman v. Pickersgill*, 2 Wils. (K.B.) 145, at 146: "It is an universal rule that an affirmative statute is hardly ever repealed by a subsequent statute; for if it is possible to reconcile two statutes they shall both stand together." The conflicting principle is illustrated by *Parry v. Croydon Commercial Gas and Coke Company*, 11 C. B. N. S. 579, 15 C. B. N. S. 568. Reference should be made by all inquiring into this subject, to Lord Blackburn's full discussion of it, in *Garnet v. Bradley*, 3 App. Cas. 944, at 965-969. His expression is (at 967): "Where there is some particular law standing, and a subsequent enactment has general words which would repeal that particular law or particular custom, if they were taken in all their generality, yet, nevertheless, the first particular law is not to be repealed unless there is a sufficient indication of intention to repeal it. It is not to be repealed by mere general words; the two may stand together; the first, the particular law standing as an exceptional proviso upon the general law." The now obsolete case (see 56 & 57 Vict. c. 61, s. 2) of *Graham v. Mayor, &c., of Newcastle-on-Tyne* (1893), 1 Q. B. 643, is an excellent example of the observance of the principles we have been discussing; *Summers v. Holborn District Board of Works* (1893), 1 Q. B. 612, of their violation. In *Keep v. Vestry of St. Mary, Newington*, in the Court of Appeal, 9 R. 196, Lindley and Smith, L.JJ., Kay, L.J., dissenting, held that the Metropolitan Streets Act Amendment Act, 1867 (31 Vict. c. 5), is a "statutory permission by the Legislature to costermongers, street hawkers, or itinerant traders to carry on their business in the way in which they invariably do carry it on, provided only that they comply with the police regulations." Both parties to this appeal were probably agreed that the Act referred to gave a statutory permission to the costermongers. The only question in dispute was against whom? The police certainly. The L.JJ., assume that the protection is against the parish authorities as well. It is curious to note in Hansard, under 3rd December 1867, that the responsible minister introducing the Bill in the House of Lords speaks of it as intended merely to restore the law to what it was before the passing of the Act earlier in the year. It is also curious to note that the very disparate functions of the police and the local authorities seem not to have been present to the minds of the Lords Justices.

¹ 31 Vict. c. 5, s. 1.

² *Ante*, 427, n. 1.

circumstances there is no liability. This contention is disposed of by James, L.J., in *Thorpe v. Brumfitt*.¹ “It was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not shew what share each had in causing it. It is probably impossible for a person in the plaintiff’s position to shew this. Nor do I think it necessary that he should shew it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant.”

In the United States the law negating any power of the local authorities to grant dispensations from the operation of the general law has been unambiguously and beneficially laid down. In *Cohen v. Mayor, &c., of New York*² the “permits” sometimes “granted by common councils of cities, or by other bodies,” are declared to confer “no right upon the party who obtains” them, and in the case in question were held to impose a serious liability on the grantors. There the City of New York was sued for damages caused to the plaintiff’s intestate by the falling on him whilst walking through the streets of that city, of a pair of thills attached to a grocer’s waggon, which was stationed in the street under a permit granted by defendants, and for which they were paid. The fall was caused through the wheel of another waggon catching that of the grocer’s waggon (the street being narrow). The Court of Appeals, reversing the Court below, held the city liable; for that “it must be regarded as itself maintaining a nuisance so long as the obstruction is continued, by reason of, and under such a licence, and it must be liable for all damages which may naturally result to a third party who is injured in his person or his property by reason or in consequence of the placing of such obstruction in the highway.” In other words, the city authorities are co-operating in creating a nuisance. “We think,” the Court said, “that in a case like this, where no obstruction would have existed but for the wrongful conduct of the defendant, it (the city) must be held responsible for the damage which is caused by reason of the

James, L.J.,
in *Thorpe v.*
Brumfitt.

Licence to
obstruct.

Cohen v. The
City of New
York.

¹ L. R. 8 Ch. 650, at 656.

² 113 N. Y. 532; 10 Am. St. R. 506; see *Spier v. Brooklyn*, decided 18th February 1892. The judgment is set out in a note to *Jones on Negligence of Municipal Corporations*, 63-67. As to a licence given by local authorities to do a thing which is done negligently, *Ward v. Caledon*, 19 Ont. App. 69.

obstruction, even though it might not have happened, if the licensee had been careful in regard to the manner in which he exercised the assumed right granted him by the licensee." Gray, J., dissented, considering that the licence given by the city to do an illegal act, was not enough to charge them for the damage that had resulted. The answer to this view is that the giving the licence in the circumstances constituted an integral part of the wrongful act. The illegality was not in the way the licensed act was done but in the act itself.

Licence and non-interference distinguished.

No English local authority has, probably, gone so far as to let out standing places in the streets. Yet many refuse to interfere with barrows or stalls placed there. Such allowance, however, does not affect the original illegality of placing them there; nevertheless the local authorities are not thereby rendered liable to an action.¹ The distinction between their course of conduct and the action of the New York authorities is that, in the latter case, the Court was of opinion there was actual co-operation in an illegal act; in the former mere non-interference. Active participation in an illegal obstruction with damage resulting therefrom, would, in England and in America, alike render the local authority a joint tortfeasor with the immediate author of the obstruction. It must, however, be borne in mind that in *Mill v. Hawker*² in the Exchequer Chamber there was a difference of opinion amongst the judges, where the act complained of was outside the scope of the corporate powers; and that in England the subject has not since been authoritatively mooted.

Duty to prevent property adjoining the highway jeopardizing the user of the highway.

Binks v. South Yorkshire Railway Company.

There is, further, a duty, which will be discussed more in detail presently, on those whose property abuts on a highway to see that persons lawfully using the highway are not jeopardised by the condition of the adjoining property.

The test to determine what property abuts on a highway within the meaning of this rule, which is proposed by Blackburn, J., in *Binks v. South Yorkshire Railway and River Dun Company*,³ and approved by Willes, J., in *Hadley v. Taylor*,⁴ is to ascertain whether a person may be injured through an accident happening to him on the highway, or whether he must wander from the highway before he is in danger. Subject to this consideration there

¹ *Glossop v. Heston and Isleworth Local Board*, 12 Ch. Div. 102. In the *King v. Smith*, 4 Esp. (N.P.) 109, Lord Ellenborough directed an acquittal on an indictment for a nuisance in obstructing a highway, where it appeared there had been a twenty-five years' user of it as a market. The Chief Justice "could not hold a man to be criminal who came there under the belief that it was such a fair or market legally instituted. If the fair or market was not a legal one, the party might be proceeded against for usurping the franchise." The user, however, must be without interruption.

² L. R. 10 Ex. 92, at 95; see *ante*, 383.

³ 3 B. & S. 244.

⁴ L. R. 1 C. P. 53, at 55.

is no general duty on an owner of land adjoining a highway to fence it from the highway.¹

There is some indistinctness in the law of what is a proper user of a highway. In the United States children injured while using a highway as a playground, and not for mere purpose of going to and fro, by a defect² in a highway rendering it unsafe for travellers, have been held disentitled to maintain an action, on the ground that their user of it is an improper one.³ It has also been said that a town is not liable to one who, while stopping in the highway for the purposes of conversation, leans against a defective railing and is injured by reason of its insufficiency.⁴ Bigelow, C.J., in this latter case draws a distinction between the case of a person who, without fault or negligence on his own part, is forced against railings, or takes hold of them to aid him in his passage, or falls against them by accident, or has occasion to use them in the furtherance of his rights as a traveller; and the case of persons leaning against railings for "a place of rest while they stop in the highway to lounge, or to recover from fatigue, or to engage in conversation. If a person uses them for such purposes he does it at his own risk."

Proper users of
the highway.

These cases do not represent the effect of the English law. For instance, the head-note to *Gwinnell v. Eamer*⁵ runs: "At the time of the accident [*i.e.*, the accident which constituted the cause of action in the case] A was not passing along the way, but was standing on the grating to talk with a person at the window above it:—Held, that A was not making an improper use of the grating;" there is, however, no reference to this ground of decision in the report. English law otherwise.

In *Jewson v. Gatti*⁶ the question of what rights are comprehended under the user of a highway in an ordinary and usual manner was the subject of discussion. An open cellar abutting on a footway was protected by a bar, which was insecurely fastened. The plaintiff, a child of ten, went up to the bar and leant upon it, when it gave way, and the plaintiff fell into the cellar. At the trial, Day, J., nonsuited, substantially on the ground taken by Bigelow, C.J., in the American case. "Persons who are not using a thoroughfare in an ordinary and usual manner," said he, "that is, not using it for what it was intended, choose to wander about it and to lean against any erection that might be Jewson v. Gatti. View of Day, J.

¹ *Cornwell v. Metropolitan Commissioners of Sewers*, 10 Ex. 771.

² An insufficient railing.

³ *Stinson v. City of Gardiner*, 42 Me. 248.

⁴ *Stickney v. City of Salem*, 85 Mass. 374.

⁵ L. R. 10 C. P. 658.

⁶ 1 Times L. R. 635, and 2 Times L. R. 381, 441 (C A.); *Stieffsohn v. Brooke*, 5 Times L. R. 684, per Fry, L.J.

lawfully erected upon some one's premises abutting on to such street, could not, if they came to harm while so doing, make that person liable for any such mishap. Had the child been jostled, or had she slipped up while passing along the pavement in an ordinary way and had so fallen against the bar, which, from being insecurely fastened, had given way, and so caused the accident, her position would have been different, and she would have had a right of action."

Overruled in the Divisional Court and in the Court of Appeal. Judgment of Lord Esher, M.R.

This view was overruled both in the Divisional Court and in the Court of Appeal, and a new trial ordered, Lord Esher, M.R., saying: "This was a case of premises on the highway in a street where hundreds of persons and many children were passing up and down, and the area was left unprotected, without any due regard to the safety of the public, and that of itself might be sufficient to sustain a case for the plaintiff. But there was more than that, for there was painting going on in the cellar, and it must have been known that this would attract children; and then a bar was put up, ostensibly for the purpose of protection, against which children would naturally lean while looking down into the cellar where the painting was going on."

Considered.

There seems a disposition in the judgment of the Master of the Rolls to put the case on the ground of a special duty owing to children, though this is not distinctly stated.¹ The broader and more substantial ground seems to be that there was a dangerous hole next the highway which there was an obligation on the defendant to guard, and if they chose to guard it by a bar, that bar must be sufficient, not merely to resist the casual and inevitable pushings of people travelling along the highway, but such acts as ordinary experience shews might be reasonably expected from people using the highway. Ordinary people may stop, may talk, may rest, may look about them, may act with great latitude without losing their rights as passengers on a highway; they must, however, not take advantage of their presence on the highway for promoting objects inconsistent with its lawful user.

Harrison v. Duke of Rutland.

The point as to what class of acts is permitted to persons as incident to the user of a highway, arose unincumbered by any special feature in *Harrison v. Duke of Rutland*.² The plaintiff was using the highway, the soil of which was in the defendant, solely for the purpose of interfering with the rights of the owner over another portion of his land. The Court of Appeal held that as the plaintiff was not there for the purpose of using the highway as

¹ See *ante*, 185, 201, 203 n. ¹.

² (1893) 1 Q. B. 142, at 147. For the case law as to trespasses on a highway, see the judgment of Kay, L.J., at 155; *Reg. v. Pratt*, 4 E. & B. 860.

such, in any of the ordinary and usual modes in which people use a highway, he was a trespasser. "Cases," says Lord Esher,¹ M.R., "might arise in which it would be a question whether what a person was doing was a reasonable and usual use of a highway. In such cases there might be a question for a jury as to whether such person was using the highway as a highway for passing, in accordance with the reasonable and ordinary user of it for that purpose;" but these were not the case before the Court.

A highway, then, must be used only in the ordinary and accustomed way. Any other user by which the highway is injured will be a nuisance, and indictable;² and consequently, if special damage is caused to an individual, actionable.

By the Highways and Locomotives (Amendment) Act, 1878,³ s. 23, the local authority may recover in a summary manner from any person causing damage to the highway "by excessive weight passing along the same or extraordinary traffic thereon." A variety of cases have been decided on this section, principally with regard to the use of traction engines on agricultural roads, which has been repeatedly held to bring the persons using or responsible⁴ for the use of them within the terms of the section.

As to what constitutes extraordinary traffic there has been some fluctuation in judicial opinion. In *Pickering Lythe East Highway Board v. Barry*,⁵ Grove and Lopes, JJ., held that a person carrying materials for building a house over a highway is not liable for damage to the highway; and Lopes, J., said: "I think the Legislature intended something unusual in weight or extraordinary in the kind of traffic, either as compared with what is usually carried over roads of the same nature in the neighbourhood or as compared with that which the road in its ordinary and fair use may be reasonably subject to. It would not be sufficient to compare the weight and traffic complained of with

¹ (1893) 1 Q. B. 142, at 147.

² *Egerley's case*, 3 Salk. 183—information setting forth that no waggon ought to carry more than 2000 weight, and that the defendant used a waggon with four wheels, "*et cum inusitato numero equorum*," in which he carried 3000 or 4000 weight at one time, by which he spoiled the highway. The information was held good, despite various objections, "because it was the excessive weight which he carried that made the nuisance." Com. Dig. Chimin (A 3).

³ 41 & 42 Vict. c. 77. Sec. 16 is amended by the Highways and Bridges Act, 1891 (54 & 55 Vict. c. 63), s. 4.

⁴ *Williams v. Davies*, 44 J. P. 347; *Northumberland Whinstone Company v. Alnwick Highway Board*, 44 J. P. 360; *Barnett v. Hoo Highway Board*, 46 J. P. 805. In *Laphorn v. Harvey*, 49 J. P. 709, a sub-contractor was held alone liable, to the exoneration of the contractor under the ordinary rule. The proceedings under the 23rd sec. are in the nature of an action for a personal tort, and cannot be taken against the executor of a person offending against it. *Story v. Sheard* (1892), 2 Q. B. 515. *Commonwealth v. Allen*, 148 Pa. St. 358, 33 Am. St. R. 830, is an American authority on the "reasonable use of a highway" deciding that running a traction engine upon a single occasion is not a nuisance.

⁵ 8 Q. B. D. 59, per Lopes, J., at 62.

The Queen v.
Ellis.

traffic usually carried on in the particular road." But Bowen, J., in the later case of *The Queen v. Ellis*, doubted:¹ "I have had occasion to consider this passage in the judgment of my brother Lopes, and I cannot adopt it to its full extent;" while Field, J., giving the judgment of himself and Bowen, J., said: "If the question whether it is extraordinary traffic is an inference of law from the facts, we must consider the point, the authorities having already decided² that the word 'ordinary' must be interpreted with reference to the road in question;" and, after having discussed the facts of the case with reference to the user of traction engines as an ordinary incident of agricultural industry, he concludes: "Having regard to the character of this road and to the mode in which it was generally used, it is impossible to hold that the use of such engines was an ordinary incident of the traffic upon it."

Considered.

This decision seems more in accord with the law previously to the Act than the earlier one. The parish is not bound to repair all its roads in the same way, or judged by the same standard, but with reference to the ordinary uses respectively made of the roads.³ If this be so, what is the ordinary user of one road in a district may be extraordinary in another; and the test is what the user of the particular road is, and not what the circumstances of the neighbourhood are; nor yet what the user by one particular person may be if contrasted with the ordinary use of the road by the public.⁴ Traffic, however, resulting from the carrying on the ordinary and recognized trade of a district is not within the enactment,⁵ even though it is greater than the other traffic on the road, and is not continuous.⁶

Hill v.
Thomas.

The various decisions as to extraordinary traffic were passed in review by Bowen, L.J., in *Hill v. Thomas*,⁷ where Pickering Lythe East Highway Board v. Barry was overruled, and the definition adopted that "extraordinary traffic," as distinct from

¹ 8 Q. B. D. 466, at 469.

² "It appears to me that those words ['excessive weight,' 'extraordinary traffic'] must mean excessive and extraordinary with reference to the ordinary use and traffic upon and over the road. It is the ordinary nature of the traffic over the road which is to be the standard:" per Lindley, J., *Lord Aveland v. Lucas*, 5 C. P. D. 211, at 223 (C.A.) 351; and not traffic arising out of the recognised industries of the district even though not continuous, *Wallington v. Hoskins*, 6 Q. B. D. 206; *Savin v. Oswestry Highway Board*, 44 J. P. 766; *Tonbridge Highway Board v. Sevenoaks Highway Board*, 33 W. R. 306; *Reg. v. East and West India Dock Company*, 60 L. T. 232.

³ *Ante*, 405.

⁴ *Whitebread v. Sevenoaks Highway Board* (1892), 1 Q. B. 8.

⁵ *Wallington v. Hoskins*, 6 Q. B. D. 206.

⁶ *Raglan Highway Board v. Monmouth Steam Company*, 46 J. P. 598. The six months within which proceedings must be taken under this section run from the surveyor's certificate, and not from demand of payment: *Pool and Forden Highway Board v. Gunning*, 51 L. J. M. C. 49; see, however, *White v. Colson*, 46 J. P. 565. As to who may be summoned as surveyor, *Lancaster v. Harlech Highway Board*, 52 J. P. 805.

⁷ (1893) 2 Q. B. 333, at 340.

"excessive weight," will include "all such continuous or repeated user of the road by a person's vehicles as is out of the common order of traffic, and as may be calculated to damage the highway and increase the expenditure on its repair." Singularity of the product carried or singularity of the purpose for which it is applied, though a test, is not the sole test of the user. But "extraordinary traffic is really a carriage of articles over the road, at either one or more times, which is so exceptional in the quality or quantity of articles carried, or in the mode or time of user of the road, as substantially to alter and increase the burden imposed by ordinary traffic on the road, and to cause damage and expense thereby beyond which is common."

In the *Etherley Grange Coal Company v. Auckland District Highway Board*¹ it was sought to qualify *Hill v. Thomas* by the proposition that traffic which is of such an extent and nature as to be extraordinary in comparison with the ordinary traffic on the road in question is, nevertheless, not "extraordinary traffic" within the meaning of the statute, if it can be shewn that it is traffic of such a nature as is ordinarily conducted on other roads in the district. Lord Esher, M.R., was, however, of opinion that this contention "is directly in the teeth of the judgment in *Hill v. Thomas*, which appears to me distinctly to hold that the ordinary traffic on the particular road in question must be looked to, in order to see whether the traffic is extraordinary, and that it is none the less extraordinary with regard to that road because it would be ordinary traffic on another road;" and in this opinion Lopes and Kay, L.JJ., concurred.

*Etherley
Grange Coal
Company
v. Auckland
District High-
way Board.*

II. TURNPIKES.

A turnpike road is a public highway established by public authority, and is to be regarded as a public easement. The only difference between this and a common highway is that, instead of being made at the public expense in the first instance, it is authorized and laid out, by public authority, with funds raised in some other way than by taxation, and the cost of construction and maintenance is reimbursed by a toll levied on passengers, or on some classes of passengers, by public authority, for the purposes of reimbursement.² Every traveller has the same right to use it, paying the toll established by law, as he would have to use any other highway.

¹ (1894) 1 Q. B. 37.

² Somewhat altered from what is said by Shaw, C.J., *Commonwealth v. Wilkinson* 33 Mass. 175.

Turnpikes
regulated by
statutory
enactments
constituting
trusts ;

The case of turnpike roads was governed either by general Acts or by the particular Acts constituting the trust.¹ So far as the liability was not regulated by statute it differed nothing from that in the case of an ordinary highway ; though the trustees were liable, so was the parish.²

which have
expired.

It is not now necessary to deal at any length with the subject ; inasmuch as with very few, if any exceptions, the turnpike trusts in England have expired,³ or have been superseded by legislation turning turnpike roads into ordinary highways.⁴

III. CANALS.

We next proceed to consider any special relations raised by the existence or user of canals.

Definition.

Webster's
definition
criticized.

A canal has been defined to be an artificial highway by water, constructed for the benefit of the public by adventurers authorized by the Legislature to take tolls for its use as a compensation for their risk and labour in the undertaking.⁵ This *as a definition* is obviously very unsatisfactory. A canal need not be a highway ; for it may possibly be private property for private purposes. It need not be constructed for the benefit of the public, but for that of a private person merely. It need not be authorized by the Legislature ; for there is no law to prevent a man making a canal on his own land. There need be no tolls ; for there is nothing in morals or in law to prevent a man being a disinterested benefactor of his kind. Lastly, there is nothing in the nature of things—whatever may be the probabilities against the adoption of such a course—to prevent the Legislature authorizing the construction of a canal out of public funds, or in a manner in which neither risk nor recompense should be entailed. As a summary of certain prominent facts most frequently connoted by the notion of a canal this collocation of incidents may pass muster. Excluding the sense in which canal is used to indicate a mere conduit, a canal is an artificially constructed waterway which admits of being used for purposes of passage ;

Suggested
definition.

¹ *E.g.*, 48 & 49 Vict. c. 37 ; 38 & 39 Vict. c. 55 ; 37 & 38 Vict. c. 95 ; 36 & 37 Vict. c. 90 ; 4 Geo. IV. c. 95 ; 3 Geo. IV. c. 126 ; and many more. The principal recent cases with reference to turnpikes are *West Riding Justices v. The Queen*, 8 App. Cas. 781 ; *Justices of Lancashire v. Rochdale*, 8 App. Cas. 494 ; *Justices of the Peace for County of Lancaster v. Improvement Commissioners of Newton in Makerfield*, 11 App. Cas. 416.

² *The Queen v. Kitchener*, L. R. 2 C. C. R. 88, per Blackburn, J., at 93.

³ Such as survive are treated as local and personal Acts ; see *The Statute Law Revision Act, 1890* (53 & 54 Vict. c. 51), s. 3 ; also *Local Government Act, 1888* (51 & 52 Vict. c. 41), ss. 12, 13 ; and *Official Index to Statutes, 1892*, Tit. Highway 2.

⁴ See *Official Index to Statutes, 1892*, at 1251, u 1, and App. xvii., 1330.

⁵ Webster, *Law of Canals*, i.

and, when made by public authority, usually becomes a highway with a right of tolls attached.¹

If a canal were constructed on private property, and by agreement amongst the proprietors, putting aside questions of abstracting water from streams or rivers, the liabilities incurred would not differ from those incurred by the owners of a reservoir.²

In so far as canals are constructed under the sanction of Parliament, the rights and liabilities affecting them are regulated, in each case, by the Act to which they owe their construction; ^{Canals constructed under statutory powers.} though of course the proprietors are bound, irrespectively of statute, to keep their banks in such repair that the water cannot escape; and, where they have failed in this duty, they have even been held disentitled to recover, when clay-pits were dug in the neighbourhood of the canal into which the water of the canal escaped; on the ground that, if they had performed their obligation and kept proper banks, it was a question for the jury whether the water would have escaped.⁴

Even before the decision in *Mersey Docks Trustees v. Gibbs*,⁵ companies working a canal were held liable for negligence on the grounds before adverted to⁶—that they were not mere trustees for public purposes, but commercial adventurers undertaking an enterprise for a profit. Thus, in *Parnaby v. Lancaster Canal Company*,⁷ Judgment of Tindal, C.J., said: “We concur with the Court of Queen’s Bench in thinking that a duty of this nature [*i.e.*, to take precautions against negligence] is imposed upon the company, and that they are responsible for the breach of it, upon a similar principle to that which makes a shopkeeper who invites the public to his shop liable for neglect on leaving a trap-door open without any protection, by which his customers suffer injuries.” So long as they induce the public to use their canal they are liable for damage for neglect to keep it in repair; yet it would be unreasonable to require of them perpetually to sound and drag the length of their canal to instantly learn what obstructions might lie at the bottom, or to keep guards going along the banks to prevent the injuries inflicted by idlers. The rule to be applied in such a case is

¹ *The King v. Inhabitants of Kent*, 13 East 220; *The King v. Inhabitants of the Parts of Lindsey*, 14 East 317; *The King v. Inhabitants of St. Mary, Leicester*, 6 M. & S. 400; *The King v. Chelsea Waterworks Company*, 5 B. & Ad. 156; *The King v. Inhabitants of Woking*, 4 A. & E. 40.

² *Rylands v. Fletcher*, L. R. 3 H. L. 330.

³ *E.g.*, *Evans v. Manchester, &c., Railway Company*, 36 Ch. D. 626, at 638.

⁴ *Staffordshire and Worcestershire Canal Company v. Hallen*, 6 B. & C. 317.

⁵ L. R. 1 H. L. 93.

⁶ *Ante*, 335.

⁷ 11 A. & E. 223; *Manley v. St. Helens Canal and Railway Company*, 2 H. & N. 840.

Mersey Docks
Board v. Pen-
hallow.

stated in an earlier passage in the same judgment,¹ and is adopted in *Mersey Docks Board v. Penhallow* :² "The common law in such a case imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstruction, but to take reasonable care, so long as they kept it open for the public use of all who may choose to navigate it, that they may navigate without danger to lives and property."

Statutory
authority.

When created by statute, canal companies must take care strictly to observe the obligations imposed on them. This is by force of the general rule that where a special authority is delegated by Act of Parliament to particular persons affecting the rights of others, it must be strictly pursued;³ and where the words of the Act are ambiguous, every presumption is made against the company.⁴ A good illustration of this is found in the *Queen v. Bradford Navigation Proprietors*.⁵

Undertakers
under Parlia-
mentary
powers.

The position of undertakers, under Parliamentary powers, of the construction of a canal is most distinctly stated by Lord Ellenborough in the *King v. Kerrison*.⁶ "Can we," he says, "put any other construction upon the Act but this, that the Legislature intended that, so far as regarded the making the river navigable, and the cutting new channels for that purpose, neither public nor private rights should stand in their way, but still they should make good to the public in another shape the means of passage over such ways as they were empowered to cut through?" This principle was acted on in the case of the disturbance of the level caused by a railway being run across a highway, in *Oliver v. North-Eastern Railway Company*,⁷ the head note of which is, "where a railway, under the powers of an Act of Parliament, crosses a highway on the level, it is the duty of the company to keep the part of the way used by the public in a state of repair suitable to the ordinary and regular traffic."⁸

Right of action
limited to
where there
is special
damage.

The rule we have before noted, limiting the right of action to cases where there is special and peculiar damage, must, however, be observed. This is illustrated by two American cases. In the former, *Riddle v. Proprietors of Locks and Canals, &c.*,⁹ the canal proprietors were held liable to the owner of a raft who was

¹ 11 A. & E. 223, at 243.

² 7 H. & N. 329, at 339.

³ Per Lord Mansfield, *Rex v. Croke*, 1 Cowp. 26, at 29. Com. Dig. Grant (G. 12), *Hardcastle Statutes* (2nd ed.) 498, at 510; also per Bowen, L.J., *Mayor, &c., of Birkenhead v. London and North-Western Railway Company*, 15 Q. B. Div. at 579. The true canon, &c.

⁴ *Scales v. Pickering*, 4 Bing. 448, at 452.

⁵ 6 B. & S. 631, *ante*, 338, where the cases on statutory authority are collected and commented on.

⁶ 3 M. & S. 526, at 531.

⁷ 43 L. J. Q. B. 198.

⁸ Cp. *The Tramways Act*, 1870 (33 & 34 Vict. c. 78), s. 28.

⁹ 7 Mass. 169.

unable to pass the canal with it, without his raft grounding and being detained and a portion of it lost, for constructing their canal of a less width than they were bound to do by their charter, so that rafts of a certain description, within which the plaintiff's raft was included, could pass up and down. In the latter case, *Quincy Canal v. Newcomb*,¹ the owner of a barge using a canal resisted payment of the tolls, on the ground that the canal had never been constructed in the manner required by the plaintiff's Act of incorporation. The defendant offered to prove that he had suffered great inconvenience and injury in consequence of the canal not being constructed as it ought to have been, and that his profit would have been greater if the terms of its incorporation had been observed. He was, nevertheless, held liable, since by using the canal he was estopped to deny the canal Company's right to the payment of toll ; and if the company failed in their duty, it was a failure by which the defendant suffered no special damage peculiar to himself, but one which could be redressed by a public prosecution only. The construction of the canal is only authorized on the terms prescribed ; if it is constructed in a less onerous manner, those using it are not exempted from liability to pay for the use they make of it ; while, if they suffer special damage by reason of the non-observance of the conditions of the incorporation, they can recover. In any event the public means of redress subsists.²

The existence of a canal raises many points of difficulty in the relations which it constitutes towards the neighbouring proprietors—more especially in the mining districts. In nearly all cases these have to be decided with reference to the terms of the Acts under which the companies are constituted, and not under the terms of the common law. The opposite limits of these decisions are marked respectively by *Dudley Canal Navigation Company v. Grazebrook*³ (approved by the Exchequer Chamber in *Stourbridge Canal Company v. Earl of Dudley*,⁴ and by the House of Lords in *Great Western Railway Company v. Bennett*⁵) and by *Knowles v. Lancashire and Yorkshire Railway Company*.⁶

Relations of
canal com-
panies with
neighbouring
proprietors.

¹ 48 Mass. 276. Parson, C.J.'s, judgment in 7 Mass. 182 contains much of the ancient learning on the question of what actions, and in what circumstances, lie against corporations for breach of duty. See *ante*, 340.

² *Ante*, 349.

³ 1 B. & Ad. 59. *Midland Railway Company v. Checkley*, L. R. 4 Eq. 19.

⁴ 30 L. J. Q. B. 108.

⁵ L. R. 2 H. L. 27 ; discussed in *Midland Railway Company v. Robinson*, 15 App. Cas. 19 ; *Ruabon Brick and Terra Cotta Company v. Great Western Railway Company* (1893), 1 Ch. 427. See *Fletcher v. Great Western Railway Company*, in the Ex. Ch. 5 H. & N. 689 ; *London and North-Western Railway Company v. Evans* (1892), 2 Ch. 432, a judgment of Kekewich, J., reversed (1893), 1 Ch. 16.

⁶ 14 App. Cas. 248, at 253, 257 ; *Cromford Canal Company v. Cutts*, 5 Railway Cas. 442.

Dudley Canal
Navigation
Company v.
Grazebrook.

The former class of cases decides that where a clause in an Act of Parliament points to a restriction on the right of getting minerals within any specified distance of a canal company's cutting, yet gives the mine-owner no power to compel payment of compensation where his operations cannot be carried on without damage to the canal, but only a power to go on with his mining operations unless he is compensated, the canal company cannot maintain an action against the owner of the minerals for an injury arising from his working the minerals in the usual way if they do not choose to act as they are empowered by their Act.

Lancashire
and Yorkshire
Railway
Company v.
Knowles.

The cases, on the other hand, under the class of *Knowles v. Lancashire and Yorkshire Railway Company*¹ determine that where the Act under which the canal is constituted contains a provision to *compel* payment of compensation, and not merely a right on the part of the owner of the soil to go on with the working, unless he is compensated, there, if in any case the mine-owner works his mine, he must do so without injuring the canal; and if he does injure it he will have to pay for the injury; since his appropriate and only remedy is under the compensation sections of the Act by which either the company or the mine-owner may take proceedings for the assessment of compensation.

Dunn v.
Birmingham
Canal Com-
pany.

In this connection must be noted the case of *Dunn v. Birmingham Canal Company*,² where, as the canal company did not exercise their powers of purchase, the mine-owner proceeded to work the minerals under their canal, but his mine was flooded by the water from the canal; for the damage caused thereby he brought his action. The Exchequer Chamber, upholding the decision of the Queen's Bench, decided that the plaintiff was entitled to work his mine and the Canal Company had no remedy for any damage that might ensue to their canal from his doing so, since they were only entitled to the surface of the land. On the other hand, the defendants were entitled to bring the water into the canal, as they had an absolute power to construct

¹ 14 App. Cas. 248, at 253, 257.

² L. R. 8 Q. B. 42. Cp. *Dixon v. Metropolitan Board of Works*, 7 Q. B. D. 418; *Green v. Chelsea Waterworks Company*, 10 Times L. R. 259 (C. A.); *Langstaff v. M'Rae*, 22 Ont. R. 78. It is now settled law that, where minerals are separated from the surface, the mineral owner is not entitled to let down the surface, unless, by the deed, instrument, or Act of Parliament, by which the minerals are severed from the surface, it appears that the surface owner has parted with the right of support, per Baggallay, L.J., *Bell v. Love*, 10 Q. B. Div. 547, at 558 (S.C. 8 App. Cas. 286); and per Lord Blackburn in *Davis v. Treharne*, 6 App. Cas. 460, at 465; *Consett Waterworks Company v. Ritson*, 22 Q. B. D. 318, 321 (C. A.), 702; *Loudon and North-Western Railway Company v. Evans* (1893) 1 Ch. 16, per Bowen, L.J., at 27. But where the surface is compulsorily parted with, and the owner thinks it beneficial to work his mines and proceeds to do so, he is in no worse position than if he had never parted with the surface at all; *Great Western Railway Company v. Bennett*, L. R. 2 H. L. 27, at 40.

the canal and keep it filled with water under their Act; therefore in the absence of negligence, which was expressly negatived by the case, they were not liable for the escape of the water by action at law, and the only remedy of the plaintiff was by compensation under the provisions of the Company's Act.

Often some particular jurisdiction is appointed under canal Acts to determine all questions that may arise respecting things to be done in pursuance or in execution of the Act. Then, if the canal proprietors do anything not in strict accordance with the terms of their Act, there is not a pursuance and execution of the Act in the sense in which action is protected, and the ordinary remedy in the courts of the country is not taken away.¹ It follows that this right is reciprocal; so that, if any infringement is made on the statutory rights of companies, they are entitled to the ordinary remedies at law; in the words of Erle, J.,² "such a company [*i.e.*, a canal company] has all the rights and remedies which an individual owner of private property has, unless the statute contains some provision to take them away;" and this is manifest on principal, since such companies are grafts on the common law, and not governed by independent laws, to any greater extent than is indicated.

Ordinary remedy in Courts of the country only taken away so far as a particular jurisdiction is appointed.

The duty of canal companies, with regard to the water in or coming into their canals, is made plain by three cases—*Harrison v. Great Northern Railway Company*,³ *Boughton v. Midland Great Western Railway of Ireland Company*⁴ in the Irish Exchequer Chamber, and *Nield v. London and North-Western Railway Company*.⁵

Duty of canal companies as to water in or coming to their canals.

In the first of these the defendants undertook the maintenance of a cut or delph for carrying off water, but the banks were insufficient to resist what water they *could* contain, though sufficient for what they ordinarily did contain. By the wrongful conduct of third parties, more water was forced into the cutting than otherwise would have gone there, and, the banks being insufficient, damage was caused to the plaintiff. The defendants were held liable, since the proximate cause of the damage was their defective bank.⁶

Harrison v. Great Northern Railway Company.

¹ *Shand v. Henderson*, 2 Dow (H.L.) 519.

² *Rochdale Canal Company v. King*, 14 Q. B. 122, at 135.

³ (1864) 3 H. & C. 231; *Philadelphia, &c., Railroad Company v. Davis*, 68 Md. 281; 6 Am. St. R. 440; *Potter v. Hamilton and Strathaven Railway Company* (1864), 3 Macph. 83; *Glasgow, Barrhead and Neilston Direct Railway Company v. Parochial Board of the Abbey Parish of Paisley* (1850), 13 Dunlop 314; *Countess of Rothes v. Kirkcaldy, &c., Waterworks Commissioners* (1879), 6 Rettie 974, 7 App. Cas. 694.

⁴ (1873) Ir. R. 7 C.L. 169.

⁵ (1874) L. R. 10 Ex. 4.

⁶ In *Barber v. Nottingham, &c., Canal Company*, 15 C. B. N. S. 726, the remedy was by compensation for water flowing "over or through the banks." Under the special Act this was apparently not so in *Cockburn v. Erewash Canal Company*, 11 W. R. 34.

Boughton v.
Great Western
Railway of Ire-
land Company.

In the second case the defendant company, acting under statutory power, constructed an open cut parallel with their canal to carry off water from the overfalls of the canal in time of flood. This was properly constructed and amply sufficient to carry off the water it would be required to do. Owing to an obstruction in a sewer into which the cut flowed, and which was under the exclusive care and control of the Corporation of Dublin, water from the drain was stopped and flooded the premises of the plaintiff, who had opened a communication between his house drain and the canal drain. The Court held¹ that the plaintiff could not recover, for "the discharge of the surplus waters of the canal by this drain of the Company was lawful by statute, and therefore, in the language of Chief Justice Cockburn in *Dunn v. Birmingham Canal Company*, 'it is impossible to say that what is thus expressly legalized can be made the ground of an action of tort.'" The case was mainly decided on the analogy afforded by *Dunn v. Birmingham Canal Company*.²

Nield v.
London and
North-West-
ern Railway
Company.

The third case is that of *Nield v. London and North-Western Railway Company*,³ where the owners of a canal, being threatened with flood from a neighbouring river, erected a barricade across the canal so as to prevent more water than the canal would securely hold from coming into it and flooding warehouses they had on the banks of the canal; in consequence of the barricade the water flowed on and injured the plaintiff's premises, doing more damage than it would have done had it not been backed up by the boards. The plaintiffs were held not entitled to recover, on the ground that, except in defending themselves against the water, the defendants had nothing to do with bringing the water to the place where it did the injury complained of. The only right they had against the defendants was "not to be injured by the defendants bringing water there without giving it a sufficient means of escape."⁴

¹ Ir. R. 7 C. L. 169, at 178.

² L. R. 7 Q. B. 244, per Cockburn, C.J., at 261, L. R. 8 Q. B. 42. See *Regina v. Delamere*, 13 W. R. 757; trustees had altered the bed of a river, and damage resulted to the claimant, who was held entitled to compensation.

³ L. R. 10 Ex. 4. In the subsequent case of *Thomas v. Birmingham Canal Company*, 49 L. J. Q. B. 851, the act done, the opening of sluices, was for the protection of the neighbourhood, and also for the protection of the banks of the canal. The defendants were not called on, and *Nield v. London and North-Western Railway Company* does not appear to have been cited. The decision was that, if nothing had been done, the case would have been within *Nichols v. Marsland*, 2 Ex. Div. 1. But though something was done, as the case found that thereby the damage to the plaintiffs was not increased, it was *injuria absque damno*, and not a ground of action.

⁴ See *Menzies v. Breadalbane*, 3 Bligh (N. S.) 414, per Lord Eldon, C., at 420, citing D. 39, 3 1, §§ 1, 2. These passages "have reference to accidental and extraordinary casualties, from the flood suddenly bursting forth, and they go to this, that, in such a case, the parties may, even to the prejudice of their neighbours, for the sake of self-preservation guard themselves against the consequences; perhaps in this way the different passages in the Digest may be reconciled." See *The King v. Trafford*, 1 B. & Ad. 874, in Ex. Ch. 8 Bing. 204, 2 Cr. & J. 265.

These three cases have this in common, that damage is done to third persons by an overflow of water from causes over which the companies have no control. In the last case, the company were merely using means to protect themselves against a sudden and extraordinary casualty, and the Court decided that a property owner has by common law what Bramwell, B., described as "a kind of reasonable selfishness in such matters." "The law," he continued, "says, 'let every one look out for himself, and protect his own interest;'" and he who puts up a barricade against a flood is entitled to say to his neighbour who complains of it, 'Why did not you do the same?'"

Cases compared and considered.

In the second case the defendants did no more than they were authorized by statute to do; and since the statute enabled them to act as they did, the intervention of an independent agency could not alter the legal quality of an act, which, apart from that intervention, was lawful.

The first case differs from the other two in that the ingredient of negligence is present. The company not merely constructed works of the capacity they needed, but of a greater capacity, and, considering that greater capacity—but in that respect only—of insufficient strength. Had it not been for this negligent act in constructing a receptacle for water greater than the receptacle could safely contain, the injury would not have happened; hence they were held liable, not because they did not make the provision required by their parliamentary powers, but because having made greater, they did not do their work efficiently. Had the defendants in *Harrison v. Great Northern Railway Company*¹ constructed their delph of the same strength, and with no more than the accommodation they needed in the event of a flood, they would have been no more liable than the defendants in *Nield v. London and North-Western Railway Company*² were held. Instead of this they constructed what was in effect a reservoir inadequate to contain the volume of water they collected there.³

With these cases *Whalley v. Lancashire and Yorkshire Railway Company*⁴ must be compared. The defendants were the owners of a railway upon a slight embankment, which they were authorized

Whalley v. Lancashire and Yorkshire Railway Company.

¹ 3 H. & C. 231. As to damages from flood increased by wrongful erection of works, see *Workman v. Great Northern Railway Company*, 32 L. J. Q. B. 279.

² L. R. 10 Ex. 4.

³ In the Digest, D. 39, 3, § 1, *De Aqua et Aquæ pluviae arcendæ* is the following: *Hæc autem actio locum habet in damno nondum facto; opere tamen jam facto hoc est, de eo opere, ex quo damnum timetur. Totiensque locum habet, quotiens manu facto opere agro aqua nocitura est; id est cum quis manu fecerit, quo aliter fluere quam natura solet; si forte immittendo eam aut majorem fecerit, aut citatiorem aut vehementiorem; aut si comprimendo redundare effecerit. Quod si natura aqua noceret, ea actione non continetur.*

⁴ 13 Q. B. Div. 131.

Principle distinguished from *Nield v. London and North-Western Railway Company*.

to construct by Act of Parliament. An extraordinary storm of rain flooded the neighbouring land, and the water, being stopped by the embankment, caused an amount of pressure dangerous to its stability. The defendants, to relieve the pressure, cut trenches in the embankment, through which the water passed to the plaintiff's land in a way different from what it would otherwise have done, and thereby caused injury. In its more important aspect this case is considered in another connection. Here it is important only to distinguish the principle under which it was decided from that governing in *Nield's* case. In *Nield's* case the works were erected to prevent the aggression of a common enemy, and the decision was that the natural right of a landowner to act for his own protection was not taken away because he had constructed an artificial watercourse on his land. The case of *Whalley v. Lancashire and Yorkshire Railway Company* differs in that "an extraordinary misfortune happened. It fell upon the defendants, and, if they had allowed things to remain as they were, they would have been the sufferers; but, in order to get rid of the misfortune which had happened to them, and which, *rebus sic stantibus*, would not have injured the plaintiff, they did something which brought an injury upon the plaintiff."¹ There is all the difference between the mere averting of a threatened mischief, irrespective of where it may else fall, and the commission of a new and positive wrong. To take an illustration from the squib case.² There is the difference between hurling it away in its course to prevent suffering mischief, and taking it from the ground when it was at rest and starting it on a fresh course.

Duty to the public in connection with highways.

Duties also arise to the public generally where the course of a canal intersects public highways or places over which people have a right to pass. Thus, in *Manley v. St. Helens Canal and Railway Company*,³ a canal company were held liable for not taking reasonable precautions to render a bridge, which they had made over their canal, safe for persons passing along the road after dark, whereby a man fell into the canal and was drowned. The bridge provided was a swivel bridge, which opened when the canal was being used, and was not lighted at night. Martin, B., said: "If I were asked what kind of a bridge they ought to provide, I should say an ordinary stone bridge, such as is found on all canals;

¹ *L. c.* per Brett, M.R. 138.

² *Scott v. Shepherd* 1 Sm. L. C. (9th ed.) 480.

³ 2 H. & N. 840; *Witherley v. Regent's Canal Company*, 12 C. B. N. S. 2; *Griffiths v. East and West India Dock*, 5 Times L. R. 43; *Steinhoff v. Corporation of Kent*, 14 Ont. App. 12.

⁴ 2 H. & N. 840, at 851.

but these persons for their own profit will not incur the expense of making one."

A canal company, however, are not bound to fence their pre-
mises, even when they are alongside a public footway, unless, No duty
ordinarily
to fence. indeed, they be "substantially adjoining"; and "this is a question for the judge."¹ The towing-path by a canal is to be used only by horses employed in towing vessels, yet it is a common highway for that purpose;² consequently the canal companies do not owe any duty to persons other than those using the towing-path as a highway for the purposes of navigation to keep it in repair, "except, possibly, where they have appropriated a part of the public highway for their use as such."³

IV. BRIDGES.

A bridge has been defined⁴ as "a building constructed over a river, creek, or other stream, or over a ditch or other place, in order to facilitate the passage over the same."⁵ Definition.

"*Pons*," says Sir Edward Coke,⁶ "*significat omne quod super*

¹ *Binks v. South Yorkshire Railway, &c., Company*, 3 B. & S. 244; *Gautret v. Egerton*, L. R. 2 C. P. 371.

² Per Bayley, J., *The King v. Severn and Wye Railway Company*, 2 B. & Ald. 646, at 648.

³ *Shearman and Redfield, Law of Negligence* (4th ed.), § 403. "Where persons pay one toll for the use of one entire towing-path, parts of which are artificial and parts not, there can be no distinction made as to the duty of those who maintain the path to take reasonable care of the artificial and the natural parts, or at least to warn those who use them of defects in them. The defendants can in future, if they think fit, announce to those who pay the tolls that they must take the paths as they find them. If this be done there could be no liability for a defective state of repair, even though wilful. Whether if they gave such notice and left the banks unrepaired they could be compelled to repair them, is a question that could then be directly raised and decided:" per Bramwell, J., delivering the judgment of the majority of the Exchequer Chamber. *Winch v. Conservators of the Thames*, L. R. 9 C. P. 378, at 389. *Lee Navigation Conservators v. Button*, 6 App. Cas. 685. In America it has been laid down that where land is acquired for a public purpose, as for a canal, railway, or the like, direct benefits to the owner from its construction are deemed part of the considerations paid by the corporation acquiring the right to construct the public work; and that if embankments and abutments essential to the construction and maintenance of a canal protect the appellant's land from overflow, they are to that extent a benefit, and the presumption is that this benefit was taken into consideration in authorizing the construction; for the ordinary rule is that a contract for a right of way for a canal or a condemnation for that purpose and assessment of damages includes all direct benefits and damages: *Burk v. Simonson*, 54 Am. R. 304. Cp. *Nield v. London and North-Western Railway*, L. R. 10 Ex. 4.

⁴ 1 Bouvier Law Dict. *sub voce*. This definition is too wide, as it includes both viaducts and causeways.

⁵ In America a bridge across a street for private use has been determined to be an indictable nuisance, even though it is so high above the surface as not to impede the passage of ordinary vehicles: *Bybee v. State*, 48 Am. R. 175. The authority charged with repairing bridges is bound to rebuild if a bridge becomes destroyed: *State ex rel. Roundtree v. Board of Commissioners*, 41 Am. R. 821, where the English cases to the same effect are examined.

⁶ 2 Co. Inst. 697. Comment on the Statute of Bridges, 22 Hen. VIII. c. 5, where all the old learning is collected. After the definition in the text Coke cites the verses:

*Nil Tadcaster habet musis aut carmine dignum,
Præter magnifice structum sine flumine pontem.*

aquas transimus unde ponticulus." He seems to regard it as indispensable to the character of bridges, under 22 Hen. VIII. c. 5, that they should cross a stream or watercourse, and this view was adopted by the Court in the *King v. Inhabitants of Oxfordshire*,¹ where Lord Tenterden, C.J., said this incident of crossing a stream, &c., "must be considered as virtually included in the true import of the word 'bridge.'"

The county at large is *prima facie* liable to the repair of all public bridges within its limits, in the same manner as parishes are bound to repair all public ways within their district unless they can shew a legal obligation on some other persons or public bodies to bear the burthen,² with, however, this exception, that the parish or hundred is responsible for bridges over small streams."³

If a man build a bridge and dedicate it to the public, he is not bound to repair it at common law,⁴ for no particular man is bound to reparation of bridges by the common law, except *ratione tenuræ* or *præscriptionis*, and if no one is bound by tenure or prescription it should be repaired by the whole county,⁵ "for of common right the whole county must repair it, because it is for the common good and ease of the whole county." This liability

And adds: *Vidit et scripsit poeta in ætate.* He also gives, at 701, the following derivation: *Pons à pendendo quia tanquam in aëre pendet.* The *King v. West Riding of Yorkshire*, 7 East 588.

¹ 1 B. & Ad. 289, at 301. Compare *The Queen v. Inhabitants of Derbyshire*, 2 Q. B. 745, where it is laid down that it is not necessary to constitute a bridge that water should flow under it at all seasons of the year and all the year.

² 2 Co. Inst. 700; and a public bridge "is one all the subjects of the realm have used freely." See a very strong case, *The King v. Inhabitants of Bucks*, 12 East 192.

³ Per Blackburn, J., *The Queen v. Kitchener*, L. R. 2 C. C. R. 88, at 93.

⁴ 2 Co. Inst. 701; re *Langforth Bridge*, Cro. Car. 365. If a miller make a new bridge over a new cut of water for his own profit the county shall not be bound to repair it, though it be used by the public, since it is not made for the common benefit, 1 Roll. Abr. 368. See also 13 Co. Rep. 33. *The King v. West Riding of Yorkshire*, 2 East, 342. "A bridge built by an individual over a public highway that is useful to the public, and generally used by them, or if in the course of time it has become useful, and is used by the public, must be kept in repair by the public, as should a patriotic person build a bridge at his own expense over a public fordway it would be more than unjust to compel him also to keep it in repair:" per Nelson, J., *Heacock v. Sherman*, 14 Wend. (N.Y.) 58; *Mayor of Albany v. Cunliff*, 2 N. Y. 165.

⁵ 2 Co. Inst. 700. But the freehold of bridges, as of the highway, is in him that has the freehold of the soil; the free passage is for all the King's subjects. And though the bridge is not specifically dedicated, if it becomes used to such an extent by the public as to come to be a public convenience, the county is bound to repair it: *The Queen v. Wilts*, 6 Mod. 307, 1 Salk. 359; *The King v. West Riding of Yorkshire*, 2 Wm. Bl. 685, 5 Burr. 2594; *The King v. West Riding of Yorkshire*, 2 East 342; *The King v. Bucks*, 12 East 192. It makes no difference that the bridge is built by turnpike trustees in the line of their road, for as Lawrence, J., said in *The King v. West Riding of Yorkshire*, "It might as well be contended that if a parish were to build a new bridge on a road within their limits, they would be bound to keep it in repair afterwards, and that the county would not be liable, as that the trustees are in this case because the bridge is built in the turnpike road. In truth, the trustees are merely substituted in lieu of the parish." And Lord Ellenborough, C.J., said: "If trustees under similar acts throw this burthen generally on the counties, it may be necessary to make special legislative provision in future; but this cannot vary the common law rule." See *The Glusburne Bridge case*, *R. v. West Riding of Yorkshire*, 5 Burr. 2594; also 43 Geo. III. c. 59 s. 5.

of the county to repair does not arise so soon as it appears that a bridge built by an individual for his private purposes is of public utility, as evidenced by public use, but is dependent on dedication and adoption in a certain sense; there must be public user supplemented by public utility. The question is then one of evidence for the jury.¹ The remedy at common law for non-repair was by presentment, at the suit of the King for avoiding multiplicity of suits,² either before the justices of the King's Bench, or before justices in eyre or commissioners of oyer and terminer, or before the sheriff by commission or writ in the nature of a commission. This last remedy is, however, taken away by 28 Edw. III. c. 9.³

The common law liability is principally regulated by 22 Hen. VIII. c. 5,⁴ "concerning the repairing of decayed Bridges in Highwaies and by whom," which provides that justices of the peace shall have power to inquire of all nuisances arising from bridges broken in the highways to the damage of the King's liege people in every shire, franchise, city, or borough, and to charge the inhabitants of each county in which they might find any decayed bridges not otherwise repairable; by the 1 Anne, c. 12,⁵ which was passed because the fines for not repairing levied under the earlier Act were paid into the Exchequer instead of being handed over to the county treasurers to be applied in the repair of the bridges as was by the Act directed; by the County Bridges Act, 1803,⁶ the County Rates and Bridges Act, 1812,⁷ the County Bridges Act, 1815,⁸ the County Bridges Act, 1841,⁹ the Highways and Bridges Act, 1891,¹⁰ besides numerous other subordinate or partial enactments.

By the Locomotives Act, 1861,¹¹ s. 7, if a bridge in a turnpike or other road be damaged by a locomotive passing over it, the owner or person in charge is required to make good the damage.

¹ *The Queen v. Inhabitants of Southampton*, 17 Q. B. D. 424; s. c. 19 Q. B. D. 590, per Coleridge, C.J., at 600.

² 2 Co. Inst. 701.

³ 2 Co. Inst. 701. The statute is repealed 50 & 51 Vict. c. 55, s. 39.

⁴ 2 Co. Inst. 697.

⁵ (1 Anne Stat. 1, c. 18, Ruffhead.) Sec. 13 is repealed by the Statute Law Revision Act, 1867 (30 & 31 Vict. c. 59).

⁶ 43 Geo. III. c. 59, "Lord Ellenborough's Act," the year following the decision in the *King v. West Riding of Yorkshire*, 2 East 342. One effect of this Act is an anticipation of the Highway Act, 1835, section 5, providing that the common law liability to repair should not attach to any new bridge unless it had been erected in a substantial manner under the direction or to the satisfaction of the county surveyor. It is extended by 54 Geo. III. c. 90, but see Stat. Law Rev. Act 1890 (53 & 54 Vict. c. 33).

⁷ 52 Geo. III. c. 110. Secs. 3 & 4 repealed by the Statute Law Revision Act, 1874 (37 & 38 Vict. c. 35, No. 1).

⁸ 55 Geo. III. c. 143. See Stat. Law Rev. Act, 1890 (53 & 54 Vict. c. 33).

⁹ 4 & 5 Vict. c. 49.

¹⁰ 54 & 55 Vict. c. 63.

¹¹ 24 & 25 Vict. c. 70.

In the *Queen v. Kitchener*¹ this was held to be limited to the case of a "body of persons liable to repair in ease of the general public," and not to apply to county bridges.

The limit of the liability by common law, as declared by 22 Hen. VIII. c. 5,² is not confined to the structure of the bridge itself, but extends a distance of 300 feet from each of the ends of the bridge. By the Highway Act, 1835,³ where a county bridge has been built since 1825, the highway over it is to be repaired by those who were, at law, before the building of the bridge, bound to repair the highway. By section 46 of the Railways Clauses Consolidation Act, 1845,⁴ a railway company which crosses a road must make a bridge, and must metal and repair the bridge and road and approaches.⁵

The Metropolis Management Act, 1855,⁶ and the Public Health Act, 1875,⁷ enact that the word "street" shall apply to and include "any bridge which shall vest in the authorities under those two Acts respectively." The effect of these enactments on the sections of the Railways Clauses Consolidation Act, 1845,⁸ is stated by Lord Watson⁹ to be this: "The whole bridge, from its foundation upwards, is part and parcel of the appellants' land, with the exception of those portions of it consisting of the carriage-way and footpaths, and the materials of which they are made, which have become vested in the local authority by force of statute. The bridge, with that exception, appears to me to be as much the appellants' property as an embankment would be constructed upon land acquired for that purpose in order to carry the approaches to the bridge."

The expenses of the repairs of bridges under the Inclosure Act, 1833,¹⁰ are recoverable by means of rates made by the commissioners in the manner provided by that Act.

When the person or public body liable to repair a bridge is ascertained, the same rules apply as to determining the extent

Lord Watson
in *Great
Eastern Rail-
way Company
v. Hackney
Board of
Works.*

Liability
similar with
that in regard
to highways.

¹ L. R. 2 C. C. R. 88.

² Section 9.

³ 5 & 6 Will. IV. c. 50, s. 21; but see *The Queen v. Inhabitants of Southampton*, 17 Q. B. D. 424, 19 Q. B. D. 590.

⁴ 8 & 9 Vict. c. 20.

⁵ *North Staffordshire Railway Company v. Dale*, 8 E. & B. 836, followed *Mayor, &c., of Bury v. Lancashire and Yorkshire Railway Company*, 20 Q. B. Div. 485, and approved 14 App. Cas. 417.

⁶ 18 & 19 Vict. c. 120.

⁷ 38 & 39 Vict. c. 55, s. 149. As to what is meant by "vest in the authorities," see the cases cited *ante*, 418.

⁸ 8 & 9 Vict. c. 20.

⁹ *Great Eastern Railway Company v. Hackney Board of Works*, 8 App. Cas. 687, at 692; *Lightbound v. Higher Bebington Local Board*, 14 Q. B. D. 849, *affd.* 16 Q. B. Div. 577, is a decision on the meaning of the words "fronting, adjoining, or abutting" in s. 150 of *The Public Health Act, 1875*. *The North of England Railway Company v. Langbaugh*, 24 L. T. (N. S.) 544.

¹⁰ 3 & 4 Will. IV. c. 35.

and method of repairing as are applicable in the case of a highway, and the general law of negligence supplies the test of what constitutes negligence.

The question of fencing remains. This is usually provided Fencing. for by the statute under which the bridge is erected, as, for example, the Railways Clauses Consolidation Act, 1845,¹ and by the provision of Lord Ellenborough's Act,² to which we have already referred, by which, before a bridge can be dedicated to the public, the approval of the surveyor is required. By common law, no such requirement was made, and there seems no reason why the dedication of a bridge should, apart from statutory enactment, be subject to any other liability than that of a highway.³

Further, from a consideration of *Manley v. St. Helens Canal and Railway Company*,⁴ where there is a statutory obligation to maintain a bridge across a canal, the common law liability does not admit of being put higher than that a jury will be warranted in finding a bridge to be insufficient if, *with reference to the state of circumstances*, it is unfenced, so as to be dangerous. This liability differs nothing from the rule applicable to highways generally.⁵

V. SEA-WALLS, OR SEWERS.⁶

The law of the liability of sea frontagers to repair sea-walls, and of the extent of the duty in cases of liability, after long being the subject of misconception, has recently been placed on a satisfactory footing by a series of important and interesting cases. These we are now to consider in their bearing on the older law.

The law of the liability of frontagers arises either by prescription and custom, or by the common law.⁷

¹ 8 & 9 Vict. c. 20, ss. 49 *et seqq.*

² 43 Geo. III. c. 59, s. 5.

³ *Robbins v. Jones*, 15 C. B. N. S. 221; *Hamilton v. Vestry of St. George, Hanover Square*, L. R. 9 Q. B. 42.

⁴ 2 H. & N. 840.

⁵ *Hardcastle v. South Yorkshire Railway Company*, 4 H. & N. 67.

⁶ The *locus classicus* for the learning on this branch of law is Callis's Reading upon the Statute of Sewers. The word sewer in this connection means the "walls, ditches, banks, gutters, sewers, gotes, calcies, bridges, streams, and other defences by the coasts of the sea and marsh ground, by rage of the sea flowing and re-flowing, and by means of the trenches of fresh waters descending and having course by divers ways to the sea," subject to be broken or become in disrepair; see 23 Hen. VIII. c. 5, s. 2. See also Com. Dig. Sewers; Vin. Abr. Sewers; and The Sewers Act (1833), 3 & 4 Will. IV. c. 22; as to partial repeal of which, see The Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19); and as to s. 47, *Stracey v. Nelson*, 12 M. & W. 535.

⁷ Per Lord Coleridge, C.J., *Hudson v. Tabor*, 2 Q. B. Div. 290, at 292, citing *Keighley's case*, 10 Co. Rep. 139 a; *The King v. Commissioners of Sewers for Essex*, 1 B. & C. 477, which establishes the proposition that where one buys land below the level of high water, and which would be daily covered with water but for a sea-wall the purchaser has, *ipso facto*, notice that he is liable to contribute to repair the sea-wall. *Morland v. Cook*, L. R. 6 Eq. 252, at 262. *Pyer v. Carter*, 1 H. & N. 916, which was

Prescription.

Though prescription and custom are often identified, there is a distinction between them that should be noticed. Prescription is always alleged in the name of a *person* and his ancestors, and those whose estate he has; a custom is always alleged in the land or place, and it serves for those who cannot prescribe in their own name nor in the name of any person certain, as the inhabitants of a town. The allegation of the custom for all classes of person is bad in law.¹

We are now to consider what is the liability by common law.

Crown bound
by the common
law to protect
the kingdom
from inunda-
tion.

The Crown is by the common law bound to protect the kingdom from inundation of water.²

This is laid down in the case of the Isle of Ely;³ "It is to be known that, by the common law before the statute of 6 H. VI. c. 5, the King ought of right to save and defend his realm, as well against the sea, as against the enemies that it should not be drowned or wasted, and also to provide, that his subjects have their passage through the realm by bridges and highways in safety; and therefore, if the sea-walls be broken, or the sewers or gutters are not scoured, that the fresh waters cannot have their direct course, the King ought to grant a commission to enquire and to hear and determine these defaults."⁴

The statutes⁵ superimposed on the common law relating to sea-walls and sewers are but confirmatory and extending to it, and by no means import a different liability. The general

cited by the M. R. in *Morland v. Cook*, but was spoken of by Lord Westbury, C., in *Suffield v. Brown*, 4 De G. J. & S. 185, as a case of little or no authority, and his opinion was adopted by Lord Chelmsford, C., in *Crossley v. Lightowler*, L. R. 2 Ch. 478; while in *Wheeldon v. Burrows*, 12 Ch. Div. 31, the Court of Appeal definitely overruled it, notwithstanding the *dicta* of Mellish and James, L.JJ., in *Watts v. Kelson*, L. R. 6 Ch. 166, at 170. James, L.J., was one of the Court in *Wheeldon v. Burrows*.

¹ Gateward's case, 6 Co. Rep. 59 b; Co. Lit § 170, 113 b; *Fitch v. Rawling*, 2 H. Bl. 393; *Selby v. Robinson*, 2 T. R. 758, where a custom, "for poor and indigent householders living in A," was held too vague; *Earl of Coventry v. Willes*, 9 L. T. (N. S.) 384; *Hall v. Nottingham*, 1 Ex. D. 1; *Allgood v. Gibson*, 34 L. T. (N. S.) 883, where a custom to have common of fishery over the lord's waters on the waste of the manor, and to take and carry away fish as a profit *à prendre*, was held unreasonable; *Bourke v. Davis*, 44 Ch. D. 110; *Goodman v. Mayor of Saltash*, 7 App. Cas. 633, distinguished *Tilbury v. Silva*, 45 Ch. Div. 98.

² *Nos pro eo quod ratione dignitatis nostre regie ad providendum salvationi regni nostri Anglie circumquaque sumus astricti* are the words of the old writ in the Register. The 23 Hen. VIII. c. 5, s. 3 says: "We, therefore, for that, by reason of our dignity and prerogative royal, we be bounden to provide for the safety and preservation of our realm of England, willing that speedy remedy be had in the premises, &c.," see Fitzherbert, *De Natura Brevium*, 113 a.

³ 10 Co. Rep. 141 a; *Le Case del Royall Piscarie de la Banne*, Sir John Davys, 55; "Commission of Sewers to defend the kingdom against the sea is very ancient, and even by special prescription in some cases; but sewers for melioration of land are by Act of Parliament," per Holt, C. J., 12 Mod. 331; see also the precedent quoted in the Case of the Isle of Ely, 10 Rep. 141 b, of Pasch. 44 E. III. Midd. 2; *Henly v. Mayor, &c. of Lyme*, 5 Bing. 91, per Best, C. J., at 109.

⁴ Cp. Fitzherbert *De Natura Brevium*, 113; see also 225 E.

⁵ 6 Hen. VI. c. 5; 18 Hen. VI. c. 10; 4 Hen. VII. c. 1; 6 Hen. VIII. c. 10; 23 Hen. VIII. c. 5. See 4 Co. Inst. 275.

terms of the commissions issued in conformity with the statutes obliged every one, within the jurisdiction of the Commissioners,¹ to contribute who received benefit, even if not immediate.² Notwithstanding the terms of the commissions, an impression seems to have been general that the fact of being a frontager imposed the liability to safeguard against the sea; and this proposition is adopted by Callis in his celebrated Reading on the statute of Sewers,³ founding himself on a case from the Liber Assisarum in the 37 Edward III. 218, pl. 10. But the passage cited is shown by Cockburn C.J.,⁴ not to bear the meaning sought to be put upon it; and after a careful examination of the authorities that learned judge lays down the proposition that "the fact that the owner of land fronting the sea might be liable under a commission issued by virtue of the King's authority by no means tends to show that, independently of a royal commission, such liability existed at common law;" he adds, "We see nothing to warrant our holding it to exist." His view was adopted by the Court of Appeal,⁵ where Lord Coleridge, C.J., discussing the probable origin of a sea-wall, as to which there is no authentic account, said: "In all likelihood it was first erected either by the King, at the expense of those to be benefited by it, assessed upon them respectively in proportion to the benefit they did or would respectively receive, or by some great land-owner, for his own benefit, whose land, if it came into the hands of separate owners, would be liable to no other burdens than those which the law imposes upon all other land within the realm. But as we have said, we can see no reason for holding that the burden sought to be imposed upon the defendant in this case in respect of his frontage land is one of such burdens." The law thus laid down is that there is no common law duty on the frontager, merely as frontager, to erect or maintain a sea-wall for the protection of his neighbour.

Cockburn,
C.J.'s, criti-
cism on Callis.

In *Attorney-General v. Tomline*,⁶ the position was advanced that the owner of foreshore in the natural user of his property is entitled to take away the shingle and sell it, even though his doing so diminishes the natural barrier against the sea, and may expose his neighbours to be flooded. The case differs from *Hudson v. Tabor* in this, that *Hudson v. Tabor* sought to establish a liability to maintain a barrier against the sea, while in *Attorney-General v. Tomline* a right to destroy a natural barrier was

Attorney-
General v.
Tomline.

¹ *Mayor, &c., of New Romney v. Commissioners of Sewers for New Romney* (1892), 1 Q. B. 840.

² *Soady v. Wilson*, 3 A. & E. 248; *Hedley v. Bates*, 13 Ch. D. 498. ³ P. 115.

⁴ *Hudson v. Tabor*, 1 Q. B. D. 225, at 232; *Nitro-phosphate and Odam's Chemical Manure Company v. London and St. Katharine Docks Company*, 9 Ch. D. 503.

⁵ 2 Q. B. Div. 290.

⁶ 12 Ch. D. 214, 14 Ch. Div. 58.

advanced. From the absence of a duty to keep up a sea-wall, which was admitted in *Hudson v. Tabor*, it was sought to reason through the equally admitted right of a man to the natural enjoyment of his property to the establishment of a right to remove an existing protection. Fry, J.,¹ was inclined to hold on the analogy of *Baird v. Williamson*² and *Fletcher v. Smith*,³ that to remove shingle from the foreshore was a natural user of land, and similar in its nature to the digging of coal; yet he did not decide the case on this ground, to which, in the Court of Appeal Brett and Cotton, L.JJ.,⁴ abstain from giving their assent. The ground of the decision is that there is in the Crown a duty to guard the shores and land adjoining the sea from being overflowed by the sea; consequently there is an obligation on every person possessed of a sea bank to do nothing inconsistent with the protection of the land from the inroads of the sea. As James, L.J.,⁵ points out, the existence of such a duty on the part of the Crown is inconsistent with the right claimed; for the exercise of the right would be a wrongful act, in the nature of a nuisance, indictable by the Crown, and "the person who suffered the particular damage occasioned by the nuisance would have a right to call upon the Court to interfere for his protection." This duty does not extend to give protection to artificial structures, but only to natural protecting banks against the sea and the waters of tidal rivers.⁶

Damage caused by extraordinary storm where there exists a prescriptive liability in ordinary cases. *The Queen v. Commissioners of Sewers for Essex*.

The case of damage caused by an extraordinary storm and high tide came before the Courts in the *Queen v. Commissioners of Sewers for Essex*,⁷ where the prescriptive liability of the frontager to repair the sea-wall in ordinary cases was admitted; but where it was, in addition, sought to impose a liability to keep in repair against the act of God. The case had been mooted and decided so long ago as 1609 by the Common Pleas,⁸ that "if one who is bound by prescription to repair a wall *contra fluxum maris*, and he keeps the wall in good repair and of such height and as sufficient as it was accustomed; and by the sudden and unusual increase of water, salt or fresh, the walls are broken or the water overflows the walls; that in this case the Commissioners of Sewers ought to tax all such persons who hold any lands or tenements, or common of pasture, or profit of fishing, or have, or may have,

¹ 12 Ch. D. at 228

² 15 C. B. N. S. 376.

³ 2 App. Cas. 781, *sub nom.* *Smith v. Musgrave*, 47 L. J. Q. B. 4.

⁴ Brett, L.J., 14 Ch. Div. at 67; Cotton, L.J., at 69.

⁵ L. c. at 62.

⁶ *West Norfolk Farmers Manure Co. v. Archdale*, 16 Q. B. D. 754, 758, 760.

⁷ 14 Q. B. Div. 561; in House of Lords, under the name *Commissioners of Sewers for Fobbing v. The Queen*, 11 App. Cas. 449.

⁸ *Keighley's case*, 10 Co. Rep. 139 a; *Soady v. Wilson*, 3 A. & E. 248.

any loss, damage, or disadvantage by any manner of means in the same places, according to the quantity of their lands, &c., for no fault in this case was in him who ought to repair it." On Keighley's case being cited in *The King v. Commissioners of Sewers for West Somerset*, Lord Kenyon, C.J., said:¹ "To be sure the law is so." Again, in *The King v. Commissioners of Sewers for Essex*, Abbot, C.J., in giving judgment, said:² "Even where an individual is bound by prescription or otherwise to repair, still if there be no default on his part, and damage is sustained by an extraordinary flood or tempest, the whole level must bear the loss and be contributory to the repairs."

It may therefore be concluded, though it is not absolutely decided, that where the obligation to repair has been neglected, even though the flood complained of has been caused by an extraordinary storm or high tide, the negligent frontager will be liable, on the ground that it is impossible to apportion what is due to his neglect and what would have happened in any event.³

Where there is negligence there is liability, though damage has arisen from an extraordinary storm.

In *The Queen v. Leigh*⁴ the Court made a rule absolute for a new trial because the judge had not put to the jury the contingency of a greater liability than to provide walls in a condition to resist ordinary weather and tides, and had rejected evidence shewing that the defendants and their predecessors in the lands had, in fact, repaired against the effects of the more violent tempests. In *Commissioners of Sewers for Fobbing v. The Queen*,⁵ however, after passing in review the earlier law, which we have been considering, the House of Lords adopted the proposition that a frontager is not liable to repair the damage caused by an extraordinary storm, unless the evidence establishes as against him something more than the ordinary liability of a frontager bound to repair; and, further, following *The King v. Commissioners of Sewers for West Somerset*,⁶ that the fact of repairs, appearing to have been done by the frontagers, as far back as records extend, and of there being no evidence of repairs by the level, although in all probability extraordinary storms had occurred during the period covered by the records, was not evidence from which liability for extraordinary events should be inferred.⁷

¹ 8 T. R. 312, at 313.

² 1 B. & C. 477, at 484.

³ See *Staffordshire Canal Company v. Hallen*, 6 B. & C. 317; *Harrison v. Great Northern Railway*, 3 H. & C. 231; *Collins v. Middle Level Commissioners*, L. R. 4 C. P. 279.

⁴ (1839) 10 A. & E. 398.

⁵ 11 App. Cas. 449.

⁶ 8 T. R. 312.

⁷ See per Lord Herschell, C., 11 App. Cas. 449, at 455. In this connection the law as to accretion may be noticed. See *Vin. Abr. Soil (A.)* 2, 3. Accretion may be (1) by additions to land formed so slowly that its progress cannot be perceived. In this

The subjects of the jurisdiction of commissioners of sewers are exempted from the operations of the Public Health Act, 1875,¹ by sections 13 and 327.

We have hitherto considered the subject of sewers in the meaning which the term more especially bears in connection with the statute of Henry VIII., and which has become familiar from the title of Callis's celebrated treatise. It remains to consider the liability for negligence arising out of the construction, maintenance, and responsibility for sewers in their most usual and modern signification.

Sutton v.
Mayor, &c.,
of Norwich.

"The word sewer," says Kindersley, V.C., in *Sutton v. Mayor, &c. of Norwich*,² "comes from the word 'to sew'—that is, to 'drain.' . . . In the common sense of the term it means a large and generally, though not always, underground passage for fluid and feculent matter from a house or houses to some other locality; but it does not comprise a cesspool for the purpose of retaining the sewage, whether as a simple deposit, or to be converted into manure or other useful purpose."

The Metro-
polis Manage-
ment Act, 1855.

By the Metropolis Management Act, 1855,³ the main sewers enumerated in schedule (D) to the Act, including the main sewers of the city of London, are vested in the Metropolitan Board of Works;⁴ but all other sewers within the limits marked by schedules (A) and (B) are in the local bodies there enumerated.

case the accretion belongs to the adjoining landowner. *Rex v. Lord Yarborough*, 3 B. & C. 91, 2 Bligh (N. S.) 147, 1 Dow (N. S.) 178; *sub nom. Gifford v. Lord Yarborough*, 5 Bing. 163. See also *In re Hull and Selby Railway Company*, 5 M. & W. 327; *Scratton v. Brown*, 4 B. & C. 485; *Foster v. Wright*, 4 C. P. D. 438; *Jefferis v. East Omaha Land Company*, 134 U.S. (27 Davis) 178. (2) by a sudden charge, as by a flood. Then the landowner is not entitled to a gain, *St. Louis v. Rutz*, 138 U.S. (31 Davis) 226. There is an exhaustive judgment in *Nebraska v. Iowa*, 143 U.S. (36 Davis) 359. *Si post emptionem fundo aliquid per alluvionem accessit ad emptoris commodum pertinet. Nam et commodum ejus esse debet cujus periculum est*, Inst. iii. 23, 3.

¹ 38 & 39 Vict. c. 55.

² 27 L. J. Ch. 739, at 742. See on the meaning of sewer in 18 & 19 Vict. c. 120, s. 204, *The Poplar District Board of Works v. Knight*, 28 L. J. M. C. 37. As to the distinction between sewers and drains, see *Acton Local Board v. Batten* 28 Ch. D. 283. A cesspool is not part of a sewer; *Meador v. West Cowes Local Board* (1892), 3 Ch. 18; *Croft v. Rickmansworth Highway Board*, 39 Ch. Div. 372; *Pinnock v. Waterworth*, 3 Times L. R. 563. As to the Metropolis, *Bateman v. Poplar District Board of Works*, 33 Ch. Div. 360; 37 Ch. D. 272. A drain is a sewer as soon as more than one house is connected with it. As a sewer might be "of any convenient material," an iron pipe to discharge affluent water was held a sewer in *Tottenham Board v. Button*, 2 Times L. R. 828. For the duty of a Local Board to see whether an existing sewer is sufficient within a reasonable time after it vests in them, see *Bonella v. Twickenham Local Board of Health*, 20 Q. B. D. 63; if they neglect they become precluded from bringing into play the provisions of sec. 150 of The Public Health Act, 1875. See *Hornsey Local Board v. Davis* (1893), 1 Q. B. 756.

³ 18 and 19 Vict. c. 120, ss. 68, 135. The powers conferred by these sections are very similar to, and should be compared with, sec. 96, vesting highways in the local authority.

⁴ Now in the County Council, 51 & 52 Vict. c. 41, s. 48, sub-s. 8. As to the vesting of sewers see *Bagshaw v. Buxton Local Board*, 1 Ch. D. 220, at 222; *Taylor v. Corporation of Oldham*, 4 Ch. D. 395, at 411; *Ogilvie v. Blything Union Sanitary Authority*, 65 L. T. 338, 67 L. T. 18; *Reg. v. Staines Local Board*, 60 L. T. 261.

By the Public Health Act, 1875,¹ all sewers are vested in the local authorities; and the authorities in whom existing sewers are vested are the authorities charged with the construction of new ones when such are required.²

To appreciate these enactments it is needful to consider the extent of the rights conferred on local boards by the vesting sewers in them, and what are the liabilities involved, as far at least as they arise out of negligence.

As to the first point, Jessel, M.R., in giving judgment in *Attorney-General v. Guardians of Poor of Union of Dorking*³—under the Public Health Act, 1875—said:⁴ “We must remember that the vesting of the sewers in the local authority gives them a very limited right of ownership. I am not prepared to say that they are in the same position as a landowner through whose land a sewer, an artificial work, runs. It by no means follows that they have the same right as he has. He can stop it up without asking anybody, but, as I read this Act of Parliament, I am by no means prepared to say that this local sanitary board can stop the sewer up, and thereby cause a most frightful nuisance to the inhabitants of the district whose drainage it is their business to protect and perfect. That is the first difficulty in the way, that the vesting is not an absolute right of ownership, but a modified and limited right of ownership, and it does not, in my opinion, give them a right to stop up the sewer.”

With this must be taken into account what was said in *Mayor, &c. of Birkenhead v. London and North-Western Railway Company*,⁵ where defendants constructed an embankment over a sewer vested in the plaintiffs under the terms of a special Act, which did not prevent access for the purpose of repairs, though it increased the difficulty of doing them; in respect of which increased difficulty of access the plaintiffs claimed compensation under section 68 of the Lands Clauses Consolidation Act, 1845.⁶ The plaintiffs were held not entitled; both in the Divisional Court,—as the vesting of the sewer “would not vest in the plaintiffs any title to the land, or any right other than the right in equity to obtain protection from disturbance by

¹ 38 & 39 Vict. c. 55, s. 13.

² *Meador v. West Cowes Local Board* (1892), 3 Ch. 18; *Ferrand v. Hallas Land and Building Company* (1893), 2 Q.B. 135; *Travis v. Uttley* (1894), 1 Q. B. 233.

³ 20 Ch. Div. 595. The main point in this case, whether the Court would order a sewer, in respect of which the defendant had taken no action, to be stopped up because its continued use was causing injury to the plaintiff, is further discussed in *Att.-Gen. v. Acton Local Board*, 22 Ch. D. 221, at 232; *Charles v. Finchley Local Board*, 23 Ch. D. 767 at 777; and *Att.-Gen. v. Clerkenwell Vestry* (1891), 3 Ch. D. 527, at 535. See also *Reg. v. Staines Local Board*, 60 L. T. 261.

⁴ 20 Ch. Div. at 604.

⁵ 15 Q. B. Div. 572.

⁶ 8 & 9 Vict. c. 18.

enforcement of legal right;" and in the Court of Appeal,—where Brett, M.R., said: "Whether, the sewer being vested in them, they have an interest in land, it is not necessary to decide, though I am inclined to think that the sewer does give them an interest in land." Bowen, L.J.'s, view was: "The true canon of construction applicable to an enactment like this, which interferes with private property, is to read into it by implication only so much as is reasonably necessary to make the Act of Parliament work. Therefore, one ought only to imply that the statute gave the commissioners such powers as were reasonably necessary for the efficient working of the sewer system."

Right to support involved in the powers conferred on local bodies with regard to sewers.

The right to support involved in the powers conferred on the local bodies with regard to sewers was formerly a matter of importance. As this has now become the subject of statutory enactment, it may be shortly disposed of. In *Metropolitan Board of Works v. Metropolitan Railway Company*¹ it was decided that local bodies do not acquire a right to lateral support for their sewers against the owners of adjoining lands; but *In re Corporation of Dudley*² the Court of Appeal further held that a right to lateral support "accrues the very moment that the sewer is constructed."³

The Public Health (Support of Sewers) Act, 1883.

These decisions have, however, been neutralised by the Public Health (Support of Sewers) Act, 1883,⁴ passed in consequence of the decision of the Court of Appeal in the case last referred to. A local authority cannot now acquire any right of support, whether vertical or lateral; though a saving clause preserves all rights actually acquired before the passing of the Act; when the owner of mines or other property is desirous of working his lands, the right to be paid for abstention arises.

Fleming v. Mayor and Corporation of Manchester.

In accordance with the principle laid down in *Geddis v. Proprietors of Bann Reservoir*,⁵ Stephen, J., in *Fleming v. Mayor and Corporation of Manchester*,⁶ held the defendants liable for the consequence of a sewer bursting into a cellar during a violent thunderstorm, where the jury found that the injury was caused by

¹ L. R. 3 C. P. 612, L. R. 4 C. P. 192; but see *Jessel, M.R., Roderick v. Aston Local Board*, 5 Ch. D. 328; and *Bowen, L. J., in London and North-Western Railway Company v. Evans* (1893), 1 Ch. 16, at 27.

² 8 Q. B. Div. 86; *London and North-Western Railway Company v. Evans* (1892), 2 Ch. 432.

³ *Normanton Gas Company v. Pope*, 52 L. J. Q. B. 629; *South Staffordshire Waterworks Co. v. Mason*, 56 L. J. Q. B. 255, is distinguished by virtue of specific enactments in the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17).

⁴ 46 & 47 Vict. c. 37. By sec. 3 it is obligatory upon local authorities to make a map of all their sanitary works.

⁵ 3 App. Cas. 430, at 450, 455; see *Harrison v. Southwark and Vauxhall Water Company* (1891), 2 Ch. 409.

⁶ 44 L. T. 517. This decision was reversed on appeal on the ground that there was no evidence of negligence. See the *Times* newspaper, 27th June 1882.

defects in the original construction of the sewer, and by the omission of the defendants to take reasonable means to discover such defects.

In *Dixon v. Metropolitan Board of Works*¹ Lord Coleridge, C.J., held the defendants not liable for injuries arising where they had constructed a sewer, acting under the powers of the Metropolis Local Management Act, 1855,² with its outfall a little above the plaintiff's coal wharf, and having water-gates, which it was the duty of a person employed by them to open when the water within became eight feet deep. This having been done on the occasion of an unusually heavy rainfall, the rush of water carried away a portion of the plaintiff's wharf, for which he sued for damages. The Lord Chief Justice found that the injury was caused by the opening of the water-gates, and not by the act of God, yet he held the defendants discharged from liability, since what they had done was no more than the performance of what they were authorized by Parliament to do, and was done without negligence.³ In the earlier case of *Hall v. Mayor, &c., of Batley*,⁴ Lush J., held the defendants liable for constructing a drain, by agreement with the plaintiff, but in so negligent a manner, that the front of plaintiff's mill was caused to sink. In answer to the objection that the undertaking such work on the part of a local body was *ultra vires*, the learned Judge pointed out that "it is not like the case put, of the urban authority entering into a contract to build a house, or a wall, or to do any other work unconnected with their function as a sanitary body."

Dixon v. Metropolitan Board of Works.

Hall v. Mayor, &c., of Batley.

In the first of these cases the defendants were held liable for not doing what they should have known ought to have been done; in the third, for doing carelessly or imperfectly what, if they did at all, they should have done with care and precaution; in the second they were held not liable, though their act occasioned damage to a third party, because what they did was, first, within the limits of their statutory powers; and, secondly, though causing damage, not negligent.

In *Ruck v. Williams*⁵ Improvement Commissioners were held liable for negligence under an Act requiring them to "make all

Ruck v. Williams.

¹ 7 Q. B. D. 418. Cp. *Derinzy v. Corporation of Ottawa*, 15 Ont. App. 712.

² 18 & 19 Vict. c. 120, ss. 135, 136.

³ *Blythe v. Birmingham Waterworks Company*, 11 Ex. 781. In *Snook v. Grand Junction Waterworks Company*, 2 Times L. R. 308, the jury were directed that a water company incorporated by Act of Parliament were not liable for an escape of water from a fracture in their pipes without some affirmative proof of negligence. Cp. *Green v. Chelsea Waterworks Company*, 10 Times L. R. 259 (C. A.). The escape of sewage would appear to come under the same principle. In *Brown v. Sargent*, 1 F. & F. 112, Erle, J., held that the liability to provide sewers was not extended to what was sufficient for extraordinary storms but that it was for the jury what is an "ordinary" or "extraordinary" amount of drainage. See *Meek v. Whitechapel Board of Works*, 2 F. & F. 144; *Hammond v. St. Pancras*, L. R. 9 C. P. 316.

⁴ 47 L. J. Q. B. 148.

⁵ 3 H. & N. 308.

proper sewers and drains to communicate with the said intended main sewers ;” for having constructed a sewer or drain communicating with the plaintiff’s premises without a flap (the absence of which caused the plaintiff’s premises to be flooded), in substitution for an old drain with a flap, the continuance of which would have protected the plaintiff’s premises. “We think,” said Martin, B., “that when the commissioners thought proper to make a new sewer communicating with the plaintiff’s premises from the old drain, and *omitted to give him that protection which he had before*, whereby there was a damage immediate and consequent upon it, that was such a damage from negligence as entitled him to maintain this action.”¹

Statutory provisions as to sanitary condition of sewers.

By section 19 of the Public Health Act, 1875,² and by section 72 of the Metropolis Management Act, 1855,³ the local bodies shall cause⁴ the sewers belonging to them to be constructed, covered, ventilated,⁵ and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied.

Under the Metropolis Management Act, 1855,³ the only remedy was to proceed at law or in equity, but by section 299 of the Public Health Act, 1875,² a representation may be made to the Local Government Board, who may direct an inquiry under sections 293 and 296; upon this an order may be obtained, which, however, Bacon, V.C., has held is not a defence to an action for nuisance.⁶

Negligence may in some cases be treated as nuisance.

In this connection the law of negligence is brought into intimate association with the law of nuisance. So far as nuisance is caused by imperfect action, or omission to act, where perfect (that is, not negligent) action—the action of a prudent man according to the circumstances—is demanded, it may be proceeded against indifferently as a negligent act or as a nuisance. To constitute a nuisance, however, more widely reaching nonfeasance or misfeasance would, in some cases, be requisite to obtain an injunction or a conviction than is, at law, required to constitute

¹ Southampton and Itchin Floating Bridge v. Local Board of Health for Southampton, 8 E. & B. 801, decided, on demurrer, that an action for negligence, and not a proceeding for compensation, is the proper remedy for want of due and proper care in the construction, management, and direction of a sewer. Other cases on the liability for negligence with regard to sewers are Lloyd v. Wigney, 6 Bing. 489; Ward v. Lee, 7 E. & B. 426; Hyams v. Webster, L. R. 2 Q. B. 264; affirmed, L. R. 4 Q. B. 138. In Bates v. Inhabitants of Westborough, 151 Mass. 174, Mr. Justice Holmes exhaustively considers the duty of a municipality in respect of the construction and maintenance of its sewers.

² 38 & 39 Vict. c. 55.

³ 18 & 19 Vict. c. 120.

⁴ This is imperative. Neglect will render the local authority liable to any person specially injured thereby. See Hammond v. Vestry of St. Pancras, L. R. 9 C. P. 316.

⁵ This word is only in the Public Health Act, 1875.

⁶ Whitefield v. Newquay Local Board, *Law Times* newspaper, March 18, 1882, 349.

actionable negligence. As, however, the cases of pollution of a stream most frequently involve infringements of public rights,¹ the more usual course of proceedings for their abatement has been against the nuisance rather than by action for negligence.

As to the general considerations of law applicable there is no dispute. Public bodies, and *à fortiori* private persons, have no right to pour sewage into streams or watercourses so as injuriously to affect the rights of individuals;² much less have they a right to use streams or watercourses so as to constitute a public nuisance.³ This prohibition, under the limitation we have before noticed,⁴ is not confined to streams and watercourses, and extends to the whole of the class of neglects comprehended within the maxim, *Sic utere tuo ut alienum non lædas*. The detailed consideration of the cases, however, comes more conveniently under the law of nuisance.

General rule
of law.

¹ *Blackburne v. Somers*, 5 L. R. Ir. 1; *Cowan v. Duke of Buccleuch*, 2 App. Cas. 344.

² *Attorney-General v. Birmingham Borough Council*, 4 K. & J. 528; *Att.-Gen. v. Richmond*, L. R. 2 Eq. 306; *Att.-Gen. v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 146; *Att.-Gen. v. Corporation of Leeds*, L. R. 5 Ch. 583; *Holt v. Corporation of Rochdale*, L. R. 10 Eq. 354.

³ See Rivers Pollution Prevention Acts 1876 (39 & 40 Vict. c. 75), & 1893 (56 & 57 Vict. c. 31). *Att.-Gen. v. Birmingham Corporation*, 17 Ch. D. 685; *Kirkheaton District Local Board v. Ainley* (1892), 2 Q. B. 274; *Rex v. Cross*, 3 Camp. 224; *Blackburne v. Somers*, 5 L. R. Ir. 1.

⁴ *Snook v. Grand Junction Waterworks Company*, 2 Times L. R. 308, citing *Freemantle v. Great Northern Railway Company*, not reported.

CHAPTER V.

GAS AND WATER COMPANIES.

Subject distributed.

WE are now to consider the position of gas and water companies. Throughout the country these are very frequently departments of the local authority, although in the metropolitan district they constitute vast independent corporations clothed with extensive Parliamentary powers. It therefore becomes necessary for us to consider (1) their relations to the local authorities of their districts where they are not a portion of that authority; then (2) their relations to the public at large; and (3) their relations to their own customers.

I. With regard to the relations of gas and water companies to the district authorities in which they carry on their operations, these may be considered from the point of view, first, of the common law unmodified by statute; and, secondly, by statute as modifying the common law.

I. Position of gas and water companies at common law.

Regina v. Longton Gas Company.

Judgment of Cockburn, C.J.

First, then, with regard to the position of gas and water companies at common law.

The law is laid down in *The Queen v. Longton Gas Company*.¹ The defendants were charged with obstructing a highway by opening trenches and laying down pipes, for the purpose of conveying gas to private houses. They had power by Act of Parliament to do such acts in respect of laying down pipes and mains for public purposes, but not for private purposes. Cockburn, C.J., giving judgment in the Queen's Bench, said: "General convenience is greatly against the allowing private persons or companies, without parliamentary powers, to interfere from time to time with the public streets. The making such openings from time to time for water, gas, sewage, and other purposes, and the opening of the streets for repairs and alterations, are a serious inconvenience, even when done under the restrictions which an Act of Parliament puts upon the persons clothed with parliamentary authority so to

¹ 2 E. & E. 651; *Ellis v. Sheffield Gas Consumers' Company*, 2 E. & B. 767—an action for negligence caused by the negligence of defendants' contractor.

act; and it would be difficult to see how far the annoyance might extend, if unauthorised dealings of this nature with the highways were allowed. Is every private person to be at liberty to open the street for laying down a pipe to any gasworks, or to any conduit of water, or to any well or fountain in a market-place? How far is such a right to extend? If everybody may lay down such a pipe from the nearest water or gas, how great would be the inconvenience from the continual opening of the streets for the first laying down and for the constantly recurring purpose of repairing. Were such private rights, as to gas, sewage, and water pipes, to be allowed, the highways would be in a constant state of obstruction. The present is an exceptional case, where it happens, from the fact of the mains being laid for public purposes that it is more easy to get at the supply of gas than in ordinary cases; but this ought not to affect the principle. The case does not seem to us to fall within what may be called the ordinary incidents and rights which, in common sense and from common use, are understood to appertain to the enjoyment of property. On the contrary, such a right as is here claimed of interfering with the streets is never exercised except under the authority of Acts of Parliament conferring special powers, with great care and under proper control, in the case of gas, by placing the companies supplying it under the provisions of The General Gasworks Companies Act, according to which the parties are subjected to wholesome restrictions, and to the control of the magistrates." In the subsequent case of *The Queen v. Train*,¹ where the right to lay tram lines in a highway without parliamentary sanction was discussed, Crompton, J., said: "This case also falls within *Regina v. The Longton Gas Company, Limited*, with which we took a good deal of pains. . . . If persons wish for power to act as the defendants acted here, they must take the usual regular and constitutional course of getting the protection of the Legislature."

The Queen v. Train.

The limits of these cases have sometimes been supposed not to coincide² entirely with cases like *Attorney-General v. Sheffield Gas Consumers' Company*³ and *Attorney-General v. Cambridge Consumers' Gas Company*.⁴ This, however, arises from a misapprehension of what those cases decided. They were proceedings in form by a public officer, but in substance by an antagonistic and competing company—in form to obtain an injunction restraining

Attorney-General v. Sheffield Gas Consumers' Company, and Attorney-General v. Cambridge Gas Consumers' Company.

¹ 2 B. & S. 640; at *Nisi Prius*, 3 F. & F. 22.

² See per Malins, V.C., *Att.-Gen. v. Cambridge Consumers' Gas Company*, L. R. 6 Eq. 282, at 293, L. R. 4 Ch. 71.

³ 3 De G. M. & G. 304.

⁴ L. R. 4 Ch. 71.

a public nuisance; in substance to prevent trade competition affecting their private interests; and in each case the Court was of opinion that "the suit has been instituted more from regard to private than to public good. If the public interest clearly required the immediate interposition of the Court, that might not be material."¹ And, again, "that not one single inhabitant is brought forward to say, though five miles of work has been completed, that there has been any inconvenience to himself; no single passenger along the Queen's highway says that he has been impeded."² The decision of the Court, moreover, was, in each case, based on the fact that what was required was an injunction, and there was a legal remedy.

In *Attorney-General v. Cambridge Consumers' Gas Company*, Page Wood, L.J., said:³ "Where the Court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two grounds which are of a totally distinct character; one is that the injury is irreparable, as in the case of cutting down trees; the other, that the injury is continuous, and so continuous that the Court . . . restrains the repeated acts, which could only result in incessant actions, the continuous character of the wrong making it grievous and intolerable."

Cases
considered.

These cases, then, decide no more than that the Courts will not interfere by injunction to restrain a nuisance which is not continuous so as to be grievous and intolerable. Now, in the same judgment of Page Wood, L.J., referring to *The Queen v. Longton Gas Company*,⁴ the Lord Justice said: "It was held, upon grounds in which I entirely acquiesce, that to say that any private individual or company may break up the pavements for the purpose of laying down gas-pipes or water-pipes, or of making communications with the gas-pipes or water-pipes of another company, without subjecting themselves to an indictment, would be to create confusion and discomfort to the inhabitants of a town." The grounds of decision were, therefore, altogether different, and cover distinct provinces—the one being referable to the equitable and discretionary jurisdiction of the Court of Chancery, the other relating to an absolute and public legal right. This is the more manifest from a note to the report in *Attorney-General v. Sheffield Gas Consumers' Company*,⁵ which states that, subsequently to the decision of the Lord Chancellor

¹ *I.e.*, that they were instituted from private, and not from public, regards; per Knight Bruce, L.J., 3 De G. M. & G. 304, at 312.

² Per Page Wood, L.J., L. R. 4 Ch. 71, at 84.

³ L. R. 4 Ch. 71, at 80.

⁴ 2 E. & E. 651.

⁵ 3 De G. M. & G. 304, at 338.

and the Lords Justices, an indictment was tried and a verdict given for the Crown, which the Queen's Bench refused to disturb, as they were of opinion that the obstruction amounted to a nuisance—or rather, probably, that there was evidence from which the jury might find the existence of a nuisance. Thus, although the Court of Chancery refused to intervene, after its refusal the legal remedy was nevertheless available through the verdict of a jury. The two Chancery cases, accordingly, illustrate the discretionary nature of the equitable jurisdiction in matters of injunction, and not any conflict with the principle of the common law, which will not allow interference with the highways.

The right of the public to the enjoyment of their highways unimpeded is absolute, and cannot be alienated even by the authorities in whom the highways are made to vest for the purposes of maintenance, but by statute only. Thus, in *Hawkins v. Robinson*,¹ where a local board affected to give permission to a gas company, without an Act of Parliament, to lay their pipes in the streets, the Court of Queen's Bench held that the licence of the local board was no answer to an indictment. The subsequent case of *Edgware Highway Board v. Harrow Gas Company*² does not affect this decision; for that did no more than adjust the respective rights of the litigants without raising any question as to the legality of their action with regard to outside persons, and turned upon the terms of an agreement made between the plaintiffs, as surveyors of the highways, and the defendant gas company, by which the plaintiffs gave permission to the defendants to break the surface of the highway to lay down gas-pipes, in consideration that the company should make good the surface of the road and should pay a specific sum per yard for the highway opened. The company laid their pipes, but did not make good the highway, and refused to pay the price. The plaintiffs were held by the Queen's Bench entitled to recover, on the ground that the agreement was not necessarily a licence to create an indictable offence; and, since it was possible so to regard it, as against the defaulting company it must be held good. There was a doubt expressed by Lush, J., whether even assuming such a contract to be illegal, the defendants would be entitled to set it up. This case, it is manifest, turns on other considerations than that of a right in the local board to give permission to dig up the highway; yet, had the case turned on the validity of such a pretension, the judgment would merely

Local boards cannot give permission to companies to disturb the highway unless empowered by statute.

Hawkins v. Robinson.

Edgware Highway Board v. Harrow Gas Company.

¹ 37 J. P. 662, cited Michael and Will, *Law relating to Gas and Water* (3rd ed.), 16.

² L. R. 10 Q. B. 92; *Benfieldside Local Board v. Consett Iron Company*, 3 Ex. D. 54; *London and North-Western Railway Company v. Evans* (1892), 2 Ch. 432 (1893), 1 Ch. 16.

authorise it to the extent that it was not a nuisance.¹ Now, it is only to the extent that an obstruction is a nuisance that it can be indicted; and what is a nuisance is for the jury; so that no conflict can arise between this decision and the rule of the common law.

Pudsey Coal
Gas Company
v. Corporation
of Bradford.
Mayor, &c., of
Preston v.
Fullwood
Local Board.

Two cases remain for consideration—Pudsey Coal Gas Company v. Corporation of Bradford,² and Mayor, &c., of Preston v. Fullwood Local Board.³

In the former the Corporation of Bradford, having parliamentary powers within the limits of their borough, commenced supplying gas in an adjoining township in which they had not parliamentary powers, but in which there was a gas company. The gas company filed a bill against the corporation to restrain them from continuing to supply gas within their district. Malins, V.C., decided, in accordance with the principle laid down by Lord Westbury in *Stockport District Waterworks Company v. Mayor, &c. of Manchester*,⁴ that though the corporation had no right to do what the bill alleged them to have done (since an incorporated body had only those powers which were conferred upon it), still there was no private right shewn which entitled the plaintiffs to maintain the suit; and further, there was nothing to prevent them supplying gas as they liked—that is, as against the plaintiffs, and in the circumstances before the Court—if they kept clear of committing a nuisance.

Mayor, &c., of
Preston v.
Fullwood
Local Board.

In *Mayor, &c., of Preston v. Fullwood Local Board*⁵ the Corporation of Preston, who had no parliamentary powers for the purpose, supplied water to an adjoining urban district, and claimed the right to enter and break up the streets, whenever occasion should require, for the purpose of repairing their water-pipes. North, J., held this a claim to commit a nuisance, which could neither be authorised by the surveyor of highways, nor obtained by acquiescence. *Edgware Highway Board v. Harrow Gas Company*⁶ was much pressed in argument, but was distinguished on the ground that it “turned on its special facts, and the grounds of the decision have no application to a case where it is not a question of committing a particular act on a particular highway at a certain time, but a question as to the right to enter on the

Edgware
Highway
Board v.
Harrow Gas
Company dis-
tinguished by
North, J.

¹ See *Windhill Local Board v. Vint*, 45 Ch. Div. 351, as to illegality of agreements compromising an indictment for nuisance.

² L. R. 15 Eq. 167.

³ 53 L. T. 718. Cp. *Normanton Gas Company v. Pope and Pearson*, 52 L. J. Q. B. 629, where pipes were laid down without parliamentary powers, but parliamentary powers were obtained subsequently; the powers thus obtained were held to cover the case of the pipes previously laid down.

⁴ 9 Jur. (N. S.) 266.

⁵ 53 L. T. 718. *Gas Light and Coke Company v. South Metropolitan Gas Company*, 4 Times L. R. 3 (C. A.), 351, turned on the construction of a clause of the *Metropolis Gas Act, 1860*.

⁶ L. R. 10 Q. B. 92.

highway and do the acts.”¹ Perhaps a more obvious and equally ^{Suggested} satisfactory ground would be that the Court will not be astute to ^{ground.} detect invalidities in a contract when the defendant has obtained the benefit and seeks to avoid the *onus* of it. One exception—though an exception not substantially interfering with the rule that pipes may not be laid in a highway without an Act of Parliament authorizing the act—must be mentioned. “The owner of the soil may carry water-pipes under a highway;”² but this right is, as pointed out by Blackburn, J., in *Cattle v. Stockton Water-works Company*,³ only “provided he does not interfere with the road above him.” Thus, not even the owner himself may disturb the highway; and he is only in a better position than other persons as by his ownership of the adjoining land, he may tunnel under the highway without interfering with the surface, while his ownership of the highway obviates what would else be a trespass.

The case of use of the soil beneath the highway, with the consent of the highway authorities, by some one not the owner of the soil, and without his assent, did arise in *Goodson v. Richardson*.⁴ The defendant, having obtained the consent of the highway board of the district, commenced to lay water-pipes in the highway, which was the soil of the plaintiff. Sir George Jessel, M.R., granted a perpetual injunction, which, on appeal, was affirmed by the Lord Chancellor and the Lords Justices, Lord Selborne, C., saying: “The plaintiff is the owner of the soil through which these pipes have been laid, and no one has a right to take that soil for such a purpose, except under contract with the owner, or with his consent. At the same time the plaintiff has not the right of an unlimited owner in respect of that soil, because the upper surface is dedicated to the public for the purpose of a public highway, which is under the management of local authorities; and the plaintiff cannot use the soil or deal with it by breaking it open, or in any other manner so as to interfere with the use of it by the public for the purposes of a highway.”

The absence of powers at common law authorizing the supply of gas and water has from time to time been supplied by various ^{II. Statutory} Acts of Parliament,⁵ both general and special; now, by the Gas ^{powers.}

¹ 53 L. T. 718, at 722.

² Per Lord Mansfield, *Goodtitle v. Alker and Elmes*, 1 Burr. 133, at 143.

³ L. R. 10 Q. B. 453, at 455.

⁴ L. R. 9 Ch. 221.

⁵ As to gas:—10 & 11 Vict. c. 15 (Gasworks Clauses); 22 & 23 Vict. c. 66 (Measures for Sale of Gas); 23 & 24 Vict. c. 125 (Metropolis Gas Act, 1860); 23 & 24 Vict. c. 146 (Measures for Sale of Gas); 24 & 25 Vict. c. 79 (Metropolis Gas Act, 1861); 34 & 35 Vict. c. 41 (Gasworks Clauses); 36 & 37 Vict. c. 89 (Gas and Water Works

Cockburn,
C.J.'s, view
of the ground
of liability.

Wightman,
J.'s, view.

Williams, J.'s,
view.

yards from the plaintiff's well. By reason of the working of mines, by persons unconnected either with the plaintiff or defendant, the floor of the tank cracked, and washings flowed into and contaminated the well. The plaintiff brought his action in respect of the contamination, and was held entitled to recover, on the ground that it had not been shewn that the manufacture of gas might not be so conducted as to prevent the washings from flowing into the neighbouring wells, and that there was neither hardship nor improbability in considering that the Legislature by using the word "suffer" meant to enact that the company should carry on their works upon the terms of preventing at all events the offensive fluids which they created from being a nuisance to the neighbourhood. Cockburn, C.J., lays some stress on negligence in the defendants. He says:¹ "The injury having proceeded immediately from their works, the *onus* was on them to get rid of the presumption of negligence;" and not having done so, they may be properly said to have "suffered" this evil to take place. This does not seem to have been the view of the other judges; for Wightman, J.,² assumes that what happened was "without any neglect or default," and considers the company to be liable as "insurers at all events against any contamination of the water in the neighbourhood;" and the judgment of the Court of Exchequer goes on the same ground. Williams, J., however, appears to prefer the ground that the Act, while not constituting the defendants insurers, yet exacts an extraordinary degree of care from them; and their failure to comply with this requisition is probably the "negligence" alluded to by Cockburn, C.J.; since negligence in the ordinary sense is precluded by the statement in the special case, that "the tank was constructed in the usual and proper manner, with proper materials, and with due care." Negligence there was in a lack of that care which was required in the circumstances—that is, of the provisions of the special Act; though no negligence could be averred in the sense of the definition of Alderson, B., in *Blyth's case*—"the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or something which a reasonable and prudent man would not do." By this test the company would have immunity; but by their special Act a higher degree of care was needed, so that if not absolutely bound to insure, they were at least bound to do the work in the best possible way, and to show that the method they had adopted was such that the injury could not possibly have been prevented.

¹ 6 H. & N. at 255.

² L. c. at 266.

The liability of gas and water companies has also been discussed in three *Nisi Prius* cases—*Blenkiron v. Great Central Gas Consumers' Company*,¹ *Mose v. Hastings and St. Leonards Gas Company*,² and *Snook v. Grand Junction Waterworks Company*.³

Green v. Chelsea.
Blenkiron v. Great Central Gas Consumers' Company.

In the first a gas company were held liable for negligence in laying on gas whereby there was an escape into premises where lights were burning, followed by an explosion which injured the plaintiff's premises. Cockburn, C.J., directed the jury "that to allow a quantity of gas to escape into premises where lights are burning was *necessarily* attended with danger of ignition, and must have been known to be so; and those who carry on operations dangerous to the public are bound to use all reasonable precautions—all the precautions which ordinary reason and experience might suggest to prevent the danger. It is not enough that they do what is *usual* if the course ordinarily pursued is imprudent and careless; for no one can claim to be excused for want of care because others are as careless as himself; on the other hand, in considering what is reasonable, it is important to consider what is usually done by persons acting in a similar business."

In the second case, *Mose v. Hastings and St. Leonards Gas Company*,⁴ an explosion took place between the discovery of the locality of an escape of gas and the arrival of the means to remedy it, though discovery of the escape might have been made earlier. Pollock, C.B., in summing up, said, "it was the duty of all gas companies to use due and reasonable care to prevent mischief from the escape and explosion of gas;" and "it was for the jury to say whether the not sending any one for several days, during which, according to the evidence, the escape of gas and the danger of an explosion was discoverable, was such reasonable care as the companies were bound to keep up."

Mose v. Hastings and St. Leonards Gas Company.

The third case was a water company case,⁵ where the plaintiff's premises were flooded with water, which was ultimately discovered to have escaped from a fracture in the defendant's water-main. The mere fact of the fracture was relied on as *prima facie* evidence of negligence, and as indicating that there was no system of inspecting and testing the pipes by the company. On the part of the defendants a theory was set up, and supported by evidence, that the fracture was occasioned by the sudden contraction of the pipe,

Snook v. Grand Junction Waterworks Company.

¹ 2 F. & F. 437, 3 L. T. (N. S.) 317.

² 4 F. & F. 324.

³ 2 Times L. R. 308.

⁴ 2 F. & F. 437, at 440.

⁵ 4 F. & F. 324.

⁶ *Snook v. Grand Junction Waterworks Company*, 2 Times L. R. 308. Cp. *Green v. Chelsea Waterworks Company*, 10 Times L. R. 259 (C. A.)

due to the difference in temperature between the incoming water and the iron of the receiving pipe. Huddleston, B., directed the jury that, "if they accepted that evidence, it was clear that the accident was inevitable, and the defendants, therefore, were not liable for it." There was a verdict for the defendants.¹

Consideration
of the cases.

Between this last-mentioned case and *Blyth v. Birmingham Waterworks Company* there are points of distinction. In *Blyth's* case the duty was to act "with reference to the average circumstance of the temperature in ordinary years;" and the cause of the damage was "the extreme severity of the frost of 1855, which penetrated to a greater depth than any which ordinarily occurs south of the Polar regions"—in short, an extraordinary natural event, the occurrence of which was not to be inferred;² while in *Snook's* case the injurious agency arose from the ordinary workings of forces of Nature which could be anticipated, but not guarded against without an incommensurably greater expense and inconvenience than the damage that want of safeguarding against them might cause. The duty was to take ordinary reasonable care. "They were not bound to ransack science in the hope of discovering some scientific specific against possible accident; they were only bound to exercise reasonable care."³ In the one case, the cause of damage being extraordinary, precautions against it were not required, from the fact that the occurrence was without the range of events in legal contemplation. In the other, reasonable care was to be used to prevent damage from an occurrence which scientific investigations could forecast as not unlikely. To constitute negligence, defect in the exercise of the normal amount of care had to be found.⁴ In *Blyth's* case no care was needed, because the extraordinary force that caused the damage was without the range of those that by law are to be guarded against; while in the other case care was needed, but not more than reasonable care.

Huddleston,
B.'s, statement
criticized.

The proposition of Huddleston, B., that water companies are only bound to use a similar kind of pipe to those in general use, is, perhaps, not exactly accurate, though it sums up what is the practical effect of the duty imposed on water companies. It

¹ With these cases compare *Holly v. Boston Gas Light Company*, 74 Mass. 123, where several positions are advanced which would not at all hold in English Law, and where several more are advanced that would only hold in a qualified degree.

² Per Mellish, L.J., *Nichols v. Marsland*, 2 Ex. Div. 5. Cp. *re Richmond Gas Company and Richmond Corporation* (1893), 1 Q. B. 56.

³ 2 Times L. R. 308, at 310.

⁴ Mr. Fraser, the defendants' engineer, was recalled at the request of the jury, and stated that the pipes were cast iron, and not wrought; the latter would be improper, and rapidly decay. In reply to his lordship, "he stated that all other water companies used the same material for their pipes as the defendants. Mr. Baron Huddleston: That answers your question; it is clearly not negligent of the defendants; they are only bound to use what are in general use": 2 Times L. R. 308, at 310.

is clearly not sufficient if all water companies, by design or unconscious coincidence, use water-pipes in fact inefficient for the ordinary purposes of water-pipes. On the other hand, the invariable use of a given description of pipe by all companies raises an almost irresistible presumption that the pipe so used is ordinarily and reasonably fit and proper, and in the absence of any special and exceptional degree of diligence being exacted, the provision by the company of the description of pipe in general use is a sufficient discharge of their duty to the public.

The duty, cast on the defendants in *Mose v. Hastings and St. Leonards Gas Company* differs from that on the defendants in *Snook v. Grand Junction Waterworks*, or rather the manifestation of it does, though the duty is the same. In *Snook's* case the defendants were held discharged because they used ordinary and reasonable care in the providing of instruments. In *Mose's* case the defendants were held liable because they had not in addition guarded against deterioration. Indeed, that case can be readily brought under the principle on which *Tarry v. Ashton*,¹ or *Murphy v. Phillips*,² was decided—the company are bound to know that things like their pipes will ultimately get out of order, and there is consequently a duty cast upon them to prevent the consequences of natural decay or deterioration. *Blenkiron v. Great Central Gas Company*³ is a case of positive negligence. In *Mose's* case the state of the pipes was allowed to become dangerous; in *Blenkiron's* there was an actual user of dangerous agencies in a dangerous way—that is, in too close proximity to lights. Those using the lights were entitled to the uninterrupted enjoyment of their own property. It therefore behoved the gas company to safeguard their operations from the dangers incident from the lawful user of the neighbouring property. This they failed to do; hence the accident. As is pointed out by Cockburn, C.J., the duty on them was no higher than the duty of the company in *Snook's* case; indeed, it is precisely the same—they were to use those precautions which ordinarily prudent and careful people appreciating the danger would use in a similar business. A point not prominent in *Huddleston, B.'s* remarks, is brought out by the Lord Chief Justice when he says,⁴ “It is not enough that they do what is *usual* if the course ordinarily pursued is imprudent and careless.” But he goes on to show “that, in considering what is reasonable, it is important to consider what is usually done by persons acting in a similar business.” Use, that is, is not the

¹ 1 Q. B. D. 314.

² 35 L. T. (N. S.) 477.

³ 2 F. & F. 437.

⁴ 2 F. & F. 437 at 440.

standard by which negligence or diligence is to be tested; still prudent use raises an almost irresistible presumption in any individual case.

Paterson v.
The Mayor,
&c. of Black-
burn.

An interesting case that was taken to the Court of Appeal is *Paterson v. The Mayor, &c. of Blackburn*.¹ A gas authority disconnected their mains from a meter. In cutting off the supply of gas, the workmen left a long piece of pipe projecting into a cellar. The pipe, though itself effectually stopped up, remained connected with the gas main. The owner of the meter sold it; and the buyer and another while trying to get the meter away, broke the projecting pipe. Finding a rush of gas into the cellar, they blew out their light, desisted from the work, and gave immediate notice of the occurrence to the gas authority. Before anything could be done, an explosion took place, a house was wrecked thereby, and seven people were killed. The plaintiff was representative of one of these and sued under Lord Campbell's Act. The negligence alleged consisted in the gas authorities' workmen having only disconnected the pipe from the main to the meter by plugging their own pipe, and "in having given Ormerod notice that his meter had been disconnected when they knew he was going to have it removed." The jury having found negligence at the trial, a new trial was moved for on the ground that there was no evidence to leave to them. This was refused, Lord Esher, M.R., saying: "The defendants were bound to have anticipated that, if they allowed an escape of gas into a house, the probability was that it would explode and injure people in the house and in the street. It was clear that the gas supply to Ormerod's meter was intended to be permanently cut off, and the question therefore was, whether, in cutting off the supply, the servants of the defendant had failed to use precautions which in reason they ought to have taken. There was a precaution—in cutting off the supply at a perfectly safe point—which would have been both easy and effective—and the jury were justified in the view of the negligence in this respect of the defendants which they had taken. Gas was so dangerous a thing, that it required the greatest precautions whether the supply was intended to be cut off permanently or even only temporarily." As reported, the plugging of the gas pipe seems to have been effectual, if the pipe were not meddled with. If, in trying to get the meter away, the buyer and his assistant needlessly and negligently broke it, it would seem hard to make the gas company liable. In the view then of the jury and of the Court of Appeal, the breaking the pipe was a natural and probable consequence of attempting to remove the

Lord Esher,
M.R.'s, judg-
ment

criticized.

¹ 9 Times L. R. 55. Cp. *Stock v. Boston (City of)*, 149 Mass. 410.

meter, and though this is nowhere mentioned in the report, it was most likely the real ground of the decision.¹

It has been contended² that the principle illustrated by *Leakage Fletcher v. Rylands*³ applies to leakages from water or gas pipes; that is, the companies are bound to keep the water or the gas, as the case may be, in their pipes, and negligence need not be proved against them when it is shown they have not done so.

Touching on this point in *Cattle v. Stockton Waterworks Company*, Blackburn, J., said:⁴ "If it were necessary to decide these questions, we should require further time to consider, as we are not as yet quite agreed on the principle of law applicable to such a case." The distinction may be pointed out that in *Fletcher v. Rylands* the bringing of the water on land was a conscious and voluntary act of the defendant; while in *Humphries v. Cousins*,⁵ for example, "the plaintiff was bound to receive sewage from the defendant's land through the old drain, but not otherwise." "Further, as the plaintiff was the occupier of a servient tenement, he was clearly not bound to repair the drain on any of the dominant tenements."

Blackburn, J.,
in *Cattle v.*
Stockton
Waterworks
Company.

The case of gas and water pipes, not merely authorized, but often required, to be placed by statute, comes rather under the principle, which we have before considered in several connections—that where the Legislature authorizes the construction of a work or the use of a particular thing for a particular purpose, the permission carries with it impliedly an exemption from responsibility for any damage arising from the construction and the contemplated use without negligence.⁶ And negligence has been defined "absence of care according to the circumstances."⁷ The point does not appear to have been raised in *Snook's case*; it is, however, the ground of the decision in *Green v. Chelsea Waterworks Company*, where Lindley, L.J., with the concurrence of the rest of the Court, held that "the doctrine of *Fletcher v. Rylands* was inapplicable to a company which was doing what it was authorized to do by Act of Parliament."⁸

Statutory
authorization

¹ See *ante*, 89.

² *Cattle v. Stockton Waterworks Company*, L. R. 10 Q. B. 453.

³ L. R. 1 Ex. 265, L. R. 3 H. L. 330.

⁴ L. R. 10 Q. B. 453, at 457.

⁵ 2 C. P. D. 239, at 244.

⁶ *Ante*, 340. *The King v. Pease*, 4 B. & Ad. 30; *Vaughan v. Taff Vale Railway Company*, 5 H. & N. 679; *Hammersmith Railway Company v. Brand*, L. R. 4 H. L. 171; *Geddis v. Proprietors of Bann Reservoir*, 3 App. Cas. 430; *Jackson v. Carshalton Gas Company*, 5 Times L. R. 69; *Green v. Chelsea Waterworks Company*, 10 Times L. R. 175 (C. A.) 259. The liability of gas companies for leakage from their pipes is also treated in the American case of *Mississinewa Mining Company v. Patton*, 28 Am. St. R. 203.

⁷ Per Willes, J., *Vaughan v. Taff Vale Railway Company*, in Ex. Ch., 5 H. & N. 679, at 688.

⁸ 10 Times L. R. 259 (C.A.).

*Cattle v.
Stockton
Waterworks
Company.*

The point actually decided in the case just alluded to, *Cattle v. Stockton Waterworks Company*,¹ is of interest as putting a limit on what would otherwise have been a most indefinite and onerous liability. The owner of land on both sides of a road contracted with the plaintiff to make a tunnel under the road for an agreed sum. When the plaintiff went to work, he found that there was a leak in the defendant's main in the road, by which the plaintiff's expense in executing the contractual work was increased. The Court declined to decide whether the mere escape of water from a main would import liability—that is, whether the landowner could have recovered in an action—but decided that the plaintiff would have no action because his contract was rendered less profitable than it would otherwise have been, had the existing state of things been different from what it actually was. It was assumed throughout that the existing state would have been different but for the defendants' water escaping. If the Court had given effect to this contention, “we should,” said Blackburn, J., “establish an authority for saying that in such a case as that of *Fletcher v. Rylands*² the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine who, in consequence of its stoppage, made less wages than he would otherwise have done.” “It may be said that it is just that all such persons should have compensation for such a loss, and that, if the law does not give them redress, it is imperfect. Perhaps it may be so. But, as was pointed out by Coleridge, J., in *Lumley v. Gye*,³ Courts of justice should not ‘allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness, as I conceive, of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts.’ In this we quite agree.”⁴

*Blackburn,
J.'s judgment.*

*Liability for
acts of ser-
vants.*

The liability of gas and water directors for the acts of their servants is, of course, only an instance of the general law of master and servant. *Rex v. Medley*,⁵ as a gas case, may be cited. The chairman and directors of a gas company were indicted for a nuisance in so polluting a river as to kill the fish therein. The evidence shewed that the directors did not know of what had

¹ L. R. 10 Q. B. 453.

² L. R. 1 Ex. 265, L. R. 3 H. L. 330.

³ 2 E. & B. 216, at 252.

⁴ *Bayley v. Wolverhampton Waterworks Company*, 6 H. & N. 241, turns on the liability of the company to repair fireplugs under a local Act as against the local board.

⁵ 6 C. & P. 292

been done till the discovery was made which was the ground for action. The contention was that the directors were, therefore, not criminally liable. Denman, C.J., however, summed up: "It is said that the directors were ignorant of what had been done. In my judgment, that makes no difference; provided you think that they gave authority to Leadbeter to conduct the works, they will be answerable. It seems to me both common sense and law that if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants."

The liability of any person¹ engaged in the manufacture of gas who causes or suffers any stream of water to be fouled with gas refuse is regulated by The Public Health Act 1875, s. 68,² by which a penalty of £200 a day is imposed on any one thus offending; while a further penalty of £20 a day is imposed for continuing the act whereby the water is fouled after expiration of twenty-four hours' notice from the local authority or the person to whom the water belongs.³ By common law pollution of a river with gas refuse is a nuisance and indictable.⁴

Fouling water with gas refuse.

III. The relations of gas and water companies with their customers.

III. Relation of gas and water companies acting under their statutory powers to their customers.

As gas and water companies are regulated by Act of Parliament, the price they may charge their customers for their commodities, the means by which they may supply them, the liabilities they are subject to, and the remedies they have at their disposal, are to be found in the various gas and water Acts, and do not belong to our subject.

The case of *Holden v. Liverpool New Gas and Coke Company*,⁵ however, illustrates a curious point of contributory negligence. The defendant company supplied gas to a house belonging to the plaintiff. The last tenant on quitting, gave notice to the company that he would not require a further supply, and one of their workmen removed a chandelier from one of the rooms, leaving the end of the pipe secured. Whilst the house remained untenanted, the gas, by some unexplained means, escaped, and an explosion took place, by which the house was damaged. The only means of shutting the gas off was a stop-cock within the house, which was the property of the plaintiff. The plaintiff

Holden v. Liverpool New Gas and Coke Company.

¹ By the definition (sec. 4) of the Public Health Act, 1875, this word includes any body of persons corporate or unincorporate. Cp. Interpretation Act, 1889, (52 & 53 Vict. c. 63) s. 19.

² The Gasworks Clauses Act, 1874 (10 & 11 Vict. c. 15), s. 21, contains similar provisions. See also The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 62.

³ *Hipkins v. Birmingham and Staffordshire Gas Company*, 6 H. & N. 250; *Millington v. Griffiths*, 30 L. T. (N. S.) 65.

⁴ *Rex v. Medley*, 6 C. & P. 292, at 299.

⁵ 3 C. B. 1.

Criticized.

The decision appears conformable with principle in a case where damage is caused by the negligence of another man's servant on the plaintiff's property; where, however, the negligence of the plaintiff's servant makes operative the negligence of a third party on the plaintiff's premises, otherwise quiescent, which can be detected by the use of reasonable prudence, then, as the employer "has put the agent in his place to do that class of acts," "he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."¹ Had the master himself done the act, he would most clearly have been guilty of contributory negligence; and he is not less so because his servant does it in his stead.

Combined negligence.

Where the liability does not attach, the explanation is due to the force of the principle thus stated in *Brown v. Illius*:² "In those cases where the negligence of the complainant is a complete legal excuse for that of the defendant, we always find that the injury is the product, to some extent, of the co-operation of causes set in motion by both parties, and is due in some measure to the combined negligence of both."

¹ Per Willes, J., *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, at 266.

² 27 Conn. 84, at 92, *ante*, 87.

BOOK III.

**DUTY TO EXERCISE CONTROL OVER
PROPERTY.**

BOOK III.

DUTY TO EXERCISE CONTROL OVER PROPERTY.

CHAPTER I.

DUTY ARISING FROM THE OCCUPATION OF PROPERTY.¹

I. RELATION TO THE PUBLIC GENERALLY.

THE duty on every occupier of land, as laid down in *Fletcher v. Rylands*,² is first to be observed—*sic utere tuo ut alienum non lædas*. This must be understood in connection with the distinction pointed out by the Lord Chancellor (Chelmsford) in the *St. Helen's Smelting Company Limited v. Tipping*³ between a nuisance producing material injury to property, and one where a personal discomfort only is involved. The legal consequences of

*Maxim sic utere
tuo ut alienum
non lædas.*

¹ Throughout these inquiries the ambiguity of the word "owner" must be borne in mind; sometimes it is used as distinguished from occupier; sometimes it includes occupier; most generally it signifies one possessing a higher title to property as against one with a subordinate title or with no title at all; in this sense owner and occupier are correlative with landlord and tenant, and are thus used. In *Chauntler v. Robinson*, 4 Ex. 163, it is said (per Parke, B., at 170): "The term 'owner' as well as 'proprietor' is ambiguous. It may mean that the defendant has the whole legal interest in the house, so that no one also had an estate in possession or reversion, or that he had the subsisting legal interest at the time of the wrong complained of, or that he was owner of the whole or some interest as distinguished from that of the tenant in possession; but in any understanding of this term there is no obligation towards a neighbour cast by law on the owner of a house, merely as such, to keep it repaired in a lasting and substantial manner; the only duty is to keep it in such a state that his neighbour may not be injured by its fall; the house may therefore be in a ruinous state, provided it be shored sufficiently; or the house may be demolished altogether." *Rich v. Basterfield*, 4 C. B. 783; *Russell v. Shenton*, 3 Q. B. 449; *Bishop v. Bedford Charity*, 1 E. & E. 697. "Owner" besides being an ambiguous, is also a statutory word, and the particular colour that it takes must be sought for in the statute to which it is in any particular case to be referred. See Stroud, *Judicial Dictionary*, *sub voce*. "Owner" in sec. 4 of the Public Health Act, 1875, does not include a receiver, *Corporation of Bacup v. Smith*, 44 Ch. D. 395; as to "owner" in ss. 150 and 257 of the same Act, see *Guardians of Tendring Union v. Bowton*, (1891), 3 Ch. 265; as to "owner" under the Metropolitan Building Act 1855 (18 & 19 Vict. c. 122), ss. 3, 73, and 97, *Wigg v. Lefevre*, 8 Times L. R. 493. In *Lindsay v. Leighton*, 150 Mass. 285, 15 Am. St. R. 199, it is said to be a question of fact whether the relation of landlord and tenant exists between parties. The actual ownership of the premises is only one element to be considered in determining this question; one may be a landlord who is not the owner.

² L. R. 1 Ex. 259, at 279.

³ 35 L. J. Q. B. 66.

the latter are dependent "on the circumstance where the thing complained of actually occurs." In the former, "the submission which is required from persons living in societies to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property."

Aldred's case.

Aldred's case¹ is an early example of that damage to property which a man may not commit even in the user of his own. The action was in case against a certain Thomas Benton alleging *prædictus Thomas ulterius machinans et malitiose intendens ipsum Willielmum (Aldred) multipliciter prægravare, &c., quoddam ædificium pro suibus et porcis suis in horto suo prædicto tam prope aulam et conclave ipsius Willielmi prædicti erexit, ac sues et porcos suos in ædificio in horto illo posuit, et illos ibidem per magnum tempus custodivit ita quod per fætidus et insalubres odores sordidorum, prædictorum suum et porcorum prædicti Thomæ in aulam et conclave prædictum ac alias partes prædicti messuagii ipsius Willielmi penetrantes et influentes idem Willielmus et famuli sui ac aliæ personæ in messuagio suo prædicto conversantes et existentes, absque periculo infectionis in aula et conclavi prædicti ac aliis locis messuagii prædicti continuare seu remanere non potuerunt.* The defendant having been found guilty, it was moved in arrest of judgment that the building of the house for hogs was necessary for the sustenance of man; and "one ought not to have so delicate a nose that he cannot bear the smell of hogs, for *lex non facit delicatorem votis*; but it was resolved that the action for it is (as this case is) well maintainable; for in a house four things are desired—*habitatio hominis, delectatio inhabitantis, necessitas luminis, et salubritas aëris*, and for nuisance done to three of them an action lies." The omitted desideratum seems to be *delectatio inhabitantis*. "A lime kiln," it is said, "is good and profitable; but if it be built so near a house that when it burns the smoke thereof enters into the house so that none can dwell therein an action lies for it."

Tenant v. Goldwin.

In *Tenant v. Goldwin*² filth from the defendant's "privy house of office" flowed into the plaintiff's cellar. The defendant was held liable for the injury done, "because it was the defendant's wall and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour; and that it was a trespass on his neighbour, as

¹ 9 Co. Rep. (1609) 57 b. The early cases are collected 1 Roll. Abr. Action Sar Case (N) Nusans.

² 1 Salk. 21, 360, 2 Ld. Raym. 1089, 6 Mod. 311, referred to at length by Blackburn, J., in his judgment in *Fletcher v. Rylands*, L. R. 1 Ex. 265, at 282-5.

if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's. . . . he must repair the wall of his house of office, for he whose dirt it is must keep it that it may not trespass."

These principles were applied to the decision of *Crowhurst v. Amersham Burial Board*.¹ A burial board planted a yew-tree on their own land and four feet from the boundary. The tree grew to project over the adjoining land where the plaintiff had a right to pasture his cattle. His horse ate of the yew-tree and was poisoned by it. Plaintiff brought his action, and recovered in the County Court for the value of his horse. A case was stated to determine whether the defendants were liable, and the judgment of the County Court judge was sustained. 'This was mainly on the finding of facts which precluded "the supposition of mere accident" and established "that the trees must be taken so as to have been planted and grown with the knowledge of the defendants, as to make them responsible for whatever might be the direct consequence of the original planting"; also that the plaintiff was not aware of the existence of the yew-tree and was not negligent. It was held that the defendants' knowledge of the poisonous quality of yew-tree leaves was immaterial; "whether they knew it or not, they must be held responsible for the natural consequences of their own act," and that having brought on the land something with a tendency to do mischief there was a duty to prevent its escaping.

An attempt to carry the principle of this case much further was made in *Giles v. Walker*.² Forest land being brought into cultivation by the occupier, became immediately covered with thistles, which had never grown there before, and thistle seeds, blown by the wind, fell in large quantities on the plaintiff's land, where they took root and did damage. Plaintiff recovered damages in the County Court, and the defendant appealed. His counsel, however, was stopped by the Court, and the plaintiff's counsel called on, who urged that *Crowhurst v. Amherst Burial Board* was in point. The judgment of the Court was very curt, Lord Coleridge, C.J., saying: "I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles which are the natural growth of the soil. The appeal must be allowed." Lord Esher, M.R., merely added, "I am of the same opinion." The distinction between the cases is most obvious: in the one something deliberately introduced produces

¹ (1878) 4 Ex. D. 5. See also *Ponting v. Noakes* (1894), 2 Q. B. 281; *Lemmon v. Webb*, 10, Times L. R. 467 (C.A.)

² 24 Q. B. D. 656.

injury through projecting over a neighbour's land; in the other the injury arises from the spontaneous product of the soil.¹

Author of a nuisance responsible for its continuance.

In *Brent v. Haddon*,² which was an action for a nuisance, it was alleged that the request to abate it was made to the lessee, whereas it ought to have been to the lessor, "for the lessee hath not any authority to abate it, being done in the time of his lessor, and it should be waste in him; nor was it any nuisance erected by him." The judgment, however, was that "the continuance is a nuisance by him, against whom the action well lies." In *Rosewell v. Prior*³ the converse was decided, that he who erects a nuisance is answerable for its continuance, though he has parted with the land; because he transfers the land with the wrong, and is answerable for the natural consequences of his act. A tenant for years erected a nuisance and then underlet the property with the nuisance subsisting. After recovery against him for the original nuisance he was held liable, on the above-stated ground, for continuing the nuisance during the underlease. In *the King v. Pedley*,⁴ the duty of the landlord was held to be to exact from his tenants an obligation to cleanse, with a right of entry for himself in case of their default, where particular care is required to prevent a place becoming a nuisance—in the case in question, "two buildings called necessary houses." This decision appears to have followed *the King v. Moore*,⁵ where the defendant used his land for pigeon-shooting, and collected a crowd of people outside so as to be a nuisance; for which he was indicted and convicted, though the crowd was outside his premises, on the ground that the assembly was the natural and probable consequence of his act."

The King v. Pedley.

Rich v. Basterfield.

Rich v. Basterfield,⁶ according to the head note in the Law Journal Report, may be cited for three propositions:

1. The owner of real property is not responsible for a nuisance committed and continued thereon by the tenant in possession.
2. If the owner of land demise it with an existing nuisance thereon, he is responsible for the continuance of that nuisance during the term; and also, if he is a party to the creation of a nuisance after the demise; but he is not responsible for a nuisance created after the demise, if he is not a party to it, though such

¹ Under the Roman Law the fate of the case would not have differed. *Sunt casus quibus cessat Aquiliæ actio . . . nam qui agrum non proscindit, qui vites non subserit, item aquarum ductus corrumpi patitur lege Aquilia non tenetur.* D. 7, 1, 13, § 2.

² Cro. Jac. 555.

³ Case 6, 2 Salk. 460, approved *Cheetham v. Hampson*, 4 T. R. 318, per Buller, J., at 320.

⁴ (1834) 1 A. & E. 822.

⁵ 3 B. & A. 184.

⁶ (1847) 16 L. J. C. P. 273, 4 C. B. 783.

nuisance is a probable consequence of the user of the land as demised.

3. An omission on the part of the owner of land to determine the tenancy, after the creation by the tenant of a continuing nuisance thereon, is not equivalent to a fresh demise of the premises so as to make him responsible for such nuisance.

The facts of the case were: A building originally used as a greenhouse in which there was a stove wont to burn coke, was converted by the defendant, when he became owner, into a shop with a fireplace and chimney, and afterwards, before any fire had been lighted, was let by the defendant to a tenant, who, week to week, lighted coal fires, that proved a nuisance to the plaintiff, smoke being driven into his drawing-room; in respect of which he sued the defendant. The Court of Common Pleas decided that the defendant was not liable; because, it being quite possible for the tenant to occupy the shop without making fires, and quite optional on his part to make them or not, or to make them so as not to annoy the plaintiff, "the utmost that can be imputed to the defendant is that he enabled the tenant to make fires if he pleased."

In the later case of *Harris v. James*, Blackburn, J.,¹ describes the actual decision in *Rich v. Basterfield* as "a desperate refinement."

Criticized by Blackburn, J.

In *Harris v. James*, land was let for the very purpose of being worked as a lime quarry and for erecting lime-kilns and burning lime. Injury arose "from the natural and necessary consequences of carrying out this object"; so that the nuisance became the landlord's. "As to the injury caused by working the quarry in a negligent and improper manner, the landlord is not liable for that, but if the demise to the tenant was on the terms that he should work the quarry by means of blasting, then he is liable."

Harris v. James.

The question of what is sufficient to affect an owner with notice of a nuisance was raised in *Gandy v. Jubber*.² Premises, to which an area was attached, were let, to a tenant from year to year, by the owner, who died having devised the property to the defendant. At the time of the testator's death there was an iron grating over the area improperly constructed, and so far out of repair as to amount to a nuisance. The defendant, having no

How an owner may be affected with notice of nuisance. *Gandy v. Jubber.*

¹ (1876) 45 L. J. Q. B. 545, at 546; In *White v. Jameson*, L. R. 18 Eq. 303, it was held that where a landlord licenses a person to come on his land, and allows him when there to commit a nuisance, the landlord is liable to be sued in equity as well as at law. Cp. *Saxby v. Manchester and Sheffield Railway Company*, L. R. 4. C. P. 198, where the owner was held not liable.

² (1864) 5 B. & S. 78, 9 B. & S. 15. As to notice being served on owner of premises to abate a nuisance under Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 4, sub-s. 3; see *Gebhardt v. Saunders* (1892), 2 Q. B. 452; *The Queen v. Mead* (1894), 2 Q. B. 124.

notice of the nuisance, suffered the tenant to remain in occupation of the premises upon the same terms as before receiving rent. The wife of A having sustained damage by reason of the dangerous condition of the grating, the Court of Queen's Bench held that the defendant as reversioner, was liable to an action in respect of the dangerous condition of the property, and that a tenancy from year to year is not, for the purposes of such an action, to be treated as a continuous tenancy, but as one recommencing every year. Error was brought, and after argument the Court of Exchequer recommended the plaintiff to settle the matter, which was done, and no judgment was given.¹

Judgment prepared by the Exchequer Chamber.

The judgment prepared by the Court of Exchequer Chamber, though not formally pronounced, was communicated to the reporter, and points out² that "the true nature of such a tenancy is that it is a lease for two years certain, and that every year after it is a springing interest, arising upon the first contract and parcel of it, so that if the lessee occupies for a number of years, these years, by computation from the time past, make an entire lease for so many years, and that after the commencement of each new year, it becomes an entire lease certain for the years past, and also for the year so entered on, and that it is not a re-letting at the commencement of the third and subsequent years."³ The conclusion is that the judgment of the Queen's Bench was wrong, and it has ever since been so regarded.

Sandford v. Clarke.

The decision in *Sandford v. Clarke*⁴ attracted notice from its being thought by some authorities to be inconsistent with the opinion of the judges in the Exchequer Chamber in *Gandy v. Jubber*. Plaintiff was injured through a defect in the condition of a coal plate in the pavement in front of a house let by the defendant on a weekly tenancy, and such defect, though not shewn to have been in existence at the commencement of the tenancy, had yet existed for nearly two years before the accident. The County Court judge nonsuited the plaintiff. Wills, J., thought "this nonsuit clearly wrong." "There is nothing to take this case out of the ordinary rule that the owner of property is liable for the consequences of the defective state of repair of the property if it is defective when let by him." It is to be observed there was no evidence of this antecedent defect. Wills, J., then

Wills, J.'s views.

¹ 5 B & S. 485, at 494. The cases are gone into at great length in *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. R. 778; where the decision is that a trustee demising property in such a condition as to be a nuisance, continues liable notwithstanding the demise.

² 9 B. & S. 15.

³ The nature of this tenancy is discussed in 4 Bac. Abr. Leases and Terms for Years (7th ed.) 838, 839. This title is said to have been written by Chief Justice Gilbert.

⁴ 21 Q. B. D. 398.

comments on *Gandy v. Jubber*, and observes of the tenancy in that case: "Such a tenancy requires something to be done between the landlord and tenant in order to determine the tenancy, but no such modification is imported into a tenancy from week to week." The proposition is not obvious, and is not explained.¹ Grantham, J., however, concurred; and the conclusion that a landlord of houses let on weekly tenancies is not to be allowed to escape from liability for the consequences of neglect to repair or to refer the injured person for redress to his unsubstantial tenants, is in accordance with good sense, and in the result not unsatisfactory.

A sounder reason for the decision in *Sandford v. Clarke* may perhaps be given than that advanced in the judgment. The ground of the liability, whether of owner or occupier, is the duty to repair, and when the Courts have evidence that the duty to repair is on any particular person he becomes thereby fixed with liability.² Now *Gandy v. Jubber* may be taken to decide that where there is a holding over at the end of a lease or a continuous tenancy from year to year, the duty to repair is *prima facie* on the occupier. The ground of this obviously is that, in the great majority of such cases, as a matter of fact, the duty of the occupier is to repair; hence the law draws a general inference that this duty arises where not excluded by the actual circumstances of the case. In the case of a weekly tenant it is common knowledge that repairs are almost universally done by the landlord. The decision in *Sandford v. Clarke*, then, may be made to rest on an intelligible principle by recognizing the existence of an almost universal practice by which, in the case of a weekly tenancy, the repairs are done by the landlord, who thus becomes liable for injury sustained by want of repair. The ordinary presumption is therefore, in this instance, rebutted, and a rebuttable presumption is substituted that repairs are done by the landlord or owner to the exoneration of the occupier.

Irrespective of questions of length of tenancy, it is clear law that when it appears that a landlord has let the premises to a tenant who is bound to maintain and repair them, *prima facie* the person liable to any one injured through want of repair is the tenant.³ This *prima facie* liability is rebutted where the premises are shewn to

¹ Indeed the very opposite is held in *Jones v. Mills*, 10 C. B. N. S. 788, by Erle, C.J., Williams, Willes, and Byles, JJ. Subsequently Wills, J., in *Bowen v. Anderson* (1894), 1 Q. B. 164, recognized the authority of *Jones v. Mills*, and expressed his opinion that the grounds of the judgment in *Sandford v. Clarke* "were not right." *Sandford v. Clarke* was "distinguished" in *Hett v. Janzen*, 22 Ont. R. 414, see *Norris v. Catmur*, 1 C. & E. 576.

² *Payne v. Rogers*, 2 H. Bl. 350.

³ (1873) *Pretty v. Bickmore*, L. R. 8 C. P. 401.

Sandford v. Clarke considered.

Tenant *prima facie* liable for want of repair of premises causing injury.

be ruinous and in danger of falling when the letting occurs; so that the landlord is guilty of the non-repair which leads to the damage. Where, then, after the demise the fall appears to have arisen from no fault of the lessee but by the laws of nature, the landlord will be liable.¹

Gwinnell v.
Eamer.

The strength of the presumption that the obligation to do the repairs is on the occupier, to the exoneration of the owner, is well illustrated by *Gwinnell v. Eamer*.² At the time of the demise of premises by the defendant to a tenant a grating, part of the demised premises placed in the foot pavement in front of the premises, was so far out of order as to be a nuisance. The owner, however, had no knowledge of the fact, and no means of knowing it, and was guilty of no negligence in being ignorant of it. By the terms of the demise the tenant bound himself to repair and keep in repair all except the roofs, main walls and main timbers of the house. The plaintiff being injured through the defect in the grating sued the defendant, the landlord. The Court of Common Pleas held that he was not liable. "I doubt very much," says Brett, J., "whether if the burthen of repair is cast upon the tenant, the duty of the landlord does not altogether cease. Here the accident occurred after the demise. If, therefore, the plaintiff has any remedy at all, it must be against the tenant and not against the landlord"; otherwise, as is pointed out by Heath, J.,³ there would be a very undesirable circuitry of action.

Landlord
undertaking
to repair.

It may be noted that where a landlord, who is under no duty to repair premises, undertakes the work of repairing and repairs so negligently and unskilfully that the lessee is injured, he thereby, under a familiar principle, renders himself liable though he need not have undertaken the work at all.⁴

Landlord no
action for
temporary
nuisance.

The lessee who erects a building without the consent of his lessor, does not commit waste by doing so, and the lessor, apart from covenant, cannot restrain him,⁵ unless the building is shewn to be an injury to the inheritance. A nuisance that is only temporary, and may cease the moment the landlord comes into possession, gives the landlord no right of action. Any action brought in respect of a temporary nuisance must be by the tenant.⁶

Building
repairs to
houses.

A point has been taken as to the rights arising out of the execution of building repairs. The principle is thus stated

¹ (1861) *Todd v. Flight*, 9 C. B. N. S. 377.

² (1875) L. R. 10 C. P. 658; *Mayor of Scarborough v. Rural Sanitary Authority*, Scarborough, 1 Ex. D. 344; see *Clancy v. Byrne*, 15 Am. R. 391, and note at 398, and *Leonard v. Storer*, 15 Am. R. 76, and note at 78.

³ *Payne v. Rogers*, 2 H. Bl. 350.

⁴ *Gregor v. Cady*, 82 Me. 131, 17 Am. St. R. 466.

⁵ Co. Lit. 53 a. As to the equitable doctrine of ameliorating waste see *Doherty Allman*, 3 App. Cas. 709, at 723, 733.

⁶ *Simpson v. Savag*, 1 C. B. N. S. 347; *Jones v. Chappell*, L. R. 20 Eq. 539.

by the Lord Chancellor in *St. Helens Smelting Company Limited v. Tipping*.¹ "If a man lives in a town, of necessity he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce; also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large." In *Herring v. The Metropolitan Board of Works*²—the case of a shopkeeper injured by a hoarding erected during the progress of certain works—Byles, J., said: "Houses must be repaired, and they cannot be otherwise repaired so properly and safely to the public as they can by having a board or hoarding to shield passengers from danger. But if these obstructions can be lawfully made by private persons, *à fortiori* may they be made by public bodies."

A Scotch case³ contains a full discussion of the law by the Lord President (Inglis). "There may," he says, "be damage—and very serious damage—arising from the operations of one's neighbour on his own premises, which yet gives rise to no claim for reparation to the person damnified. Indeed it is difficult to conceive any operation in the way of alteration of the construction of a building which will not be attended by dangerous consequences to the neighbours on either side. The generation of dust alone is an annoyance of a very serious kind, and in the case of shops of particular kinds must be almost destructive of the goods which they contain and offer for sale. The obstruction of access caused by building operations next door is also a very great risk, particularly to shopkeepers or tavern-keepers, or any class of tradesmen whose customers necessarily resort to their premises and cannot transact with them, or give them their custom elsewhere. But no one ever thought of claiming reparation for damage so produced. To countenance such a claim would be to put an end to the improvement or repair of houses within burgh, and to restrain the use of property in a manner and to an extent inconsistent with the very existence of property and the title of ownership. An operation carried on by a proprietor within burgh, which is either in its own nature unlawful, or which, though lawful in itself, is executed in a reckless, unskilful, or negligent manner, whereby injury is done to his neighbour, is a wrong in law for which reparation is due. Nay,

¹ 35 L. J. Q. B. 66, at 72.

² 34 L. J. M. C. 224, at 227; see per Lord Ellenborough, C. J., in *Rex v. Jones*, 3 Camp. 230, quoted *ante*, 413.

³ *Laurent v. The Lord Advocate* (1869), 7 Macph. 607, at 610; see *M'Intosh v. Scott*, 21 Dunlop 363, at 368; *Campbell v. Kennedy*, 3 Macph. 121, commenting on *Cleghorn v. Taylor*, 18 Dunlop 664, at 667. *Cameron v. Fraser*, 9 Rettie 26, decided that in fact unavoidable injury was caused.

where the work is of a delicate or difficult description, and likely to imperil the neighbour's tenement, the proprietor who undertakes it is bound in more exact diligence, and will be answerable for any want of due care and attention to the rights and interests of his neighbour which has been productive of damage, and the amount of care and attention required in the particular case, and the extent to which it has been neglected will always be a question for the jury on the evidence. But the principle is clear. There must be fault, or, in other words, delinquency or wrong, on the part of the defender of the action of reparation to render him liable to the pursuer in damages."

Distinction
sought to
be made.

In the case under consideration a distinction was sought to be made on the ground of the existence of the relation of landlord and tenant, and Lord Deas based his dissent from the judgment of the Lord President on this ground. If there be a contract between landlord and tenant disabling the landlord from doing the ordinary repairs to adjoining property he may be possessed of, the matter would plainly stand on its own facts and not be the foundation of a rule of law. If, on the other hand, the dissent is on the ground that the ownership of the adjoining house by the landlord should limit his rights in respect of it to a greater extent than if it were in the hands of any other person, no sufficient reason for such a limitation seems to be advanced.¹

Liability at
common law
in respect of
real property.

By common law, then, the occupier and not the owner is bound, as between himself and the public, so far to keep buildings in repair that they may be safe for the public; and the occupier is therefore *prima facie* liable to third persons for damages arising from any defect.²

The occupier is always, the owner may under peculiar circumstances be, liable for an injury sustained by a third person arising from negligence.³ If there is an express agreement between landlord and tenant that the former shall keep the premises in repair, so that in case of a recovery against the tenant he would have his remedy over, then, to avoid circuitry of

¹ Cp. *Bamford v. Turnley*, 3 B. & S. 62. In *Harris v. James*, 45 L. J. Q. B. 545, "the injury complained of arose from the natural and necessary consequences of" granting the lease. In *Tucker v. Newman*, 3 P. & D. 14, the erecting, on defendant's house, eaves and a pipe, overhanging and conducting water on land in the occupation of a tenant was held a "permanent injury," giving a cause of action to the reversioner.

² *Regina v. Watts*, 1 Salk. 357; as *R. v. Watson*, 2 Ld. Raym. 856, 3 Ld. Raym. 18; *Cheetham v. Hampson*, 4 T. R. 318. *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 4 Am. St. R. 279, was an attempt to charge a landlord for injuries to a passer-by from the fall of snow from the roof of a house which the landlord reserved the right to enter upon to repair. Where smoke issued from a chimney on premises occupied by certain persons they are liable under the Nuisances Removal Acts (18 & 19 Vict. c. 121 s. 12, 23 & 24 Vict. c. 77 s. 13, 29 & 30 Vict. 90 s. 14), though the persons actually causing the smoke to issue were their servants; *Barnes v. Ackroyd*, L. R. 7 Q. B. 474.

³ *Coupland v. Hardingham*, 3 Camp. 398.

action, the party injured by the defect and want of repair may have his action in the first instance against the landlord.¹ If, on the other hand, the owners are at once out of possession and not as between themselves and their lessees bound to repair, nor entitled to enter for the purpose of doing repairs, they are not liable for injuries received in consequence of the neglect to repair.²

A landlord who lets a house in a dangerous state is not liable to the tenant for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy, if any, is on the contract.³

Where a house is let in a dangerous state.

The law has been thus summarized :

First, that where property is demised, and, at the time of the demise is not a nuisance, and becomes so only by the act of the tenant while in his possession, and injury happen during such possession, the owner is not liable; but,

Summary.

Secondly, that where the owner leases premises which are a nuisance, or must in the nature of things become so by their user, and receives rent, then, whether in or out of possession, he is liable.⁴

It has furthermore been particularly laid down⁵ that there are only two ways in which landlords can be made liable where injury arises from the defective repair of premises let to tenants

Two ways in which landlords can be made liable for defective repair of premises.

¹ *Payne v. Rogers*, 2 H. Bl. 350. In old times, when the lessor covenanted to repair and did not, the lessor could not avail himself of the landlord's neglect as an answer to an action for the rent, Y.B. 14 H. IV. 27, pl. 35; now a counterclaim would be available. In *Pindar v. Ainsley*, cited in *Balfour v. Weston*, 1 T. R. 310, at 312, Lord Mansfield said: "The consequence of the house being burned down is that the landlord is not obliged to rebuild, but the tenant is obliged to pay the rent during the whole term"; *Arden v. Pullen*, 10 M. & W. 321; *Hart v. Windsor*, 12 M. & W. 68; *Duff v. Fleming* (1870), 8 Macph. 769. Under a general covenant to repair the tenant is bound to rebuild if the house is accidentally destroyed by fire; 3 Kent, Comm. 465; *Bullock v. Dommitt* 6 T. R. 650.

² *Payne v. Rogers*, 2 H. Bl. 350; *Chauntler v. Robinson*, 4 Ex. 163.

³ *Robbins v. Jones*, 15 C. B. N. S. 221, at 240. *De Boos v. Collard*, 8 Times L. R. 338, is a cellar flap case, where defendants had demised a cellar to sub-tenants, the flap of which was alleged likely to be dangerous to persons passing by if no warning was given since it opened upwards. Judgment was entered for defendants.

⁴ *Owings v. Jones*, 9 Md. 108, at 117; *Adams v. Fletcher*, 33 Am. St. R. 859. In *Taylor v. New York*, 4 E. D. Smith 559, *Brightly*, New York Digest 765, the Corporation of New York leased the right to collect wharfage, and their lessee was bound to repair; nevertheless they were held liable to the plaintiff for injuries sustained by reason of the insecure condition of the wharf, because they retained control over the premises. It was intimated that the decision would have been otherwise had the lease been a grant of the pier, and not of mere wharfage dues. In *Bartlett v. Baker*, 3 H. & C. 153, piles were driven into the bed of a river to enable the defendants to do certain work; when this was completed they sold the piles to one who cut them down. By cutting the piles the character of the structure they constituted was altered. The defendants were accordingly held not liable in an action brought against them for injuries sustained by a vessel running on the piles, since "if the piles had remained in the state in which the defendants left them no injury would have resulted without gross negligence on the part of the plaintiff."

⁵ *Nelson v. Liverpool Brewery Company*, 2 C. P. D. 311; *Ponsford v. Abbott*, 1 C. & E. 225.

—first, in the case of a contract by the landlord to do repairs, where the tenant can sue him for not repairing; and, secondly, in the case of a misfeasance by the landlord. In either of these two classes of cases an action will lie against the owner.¹

There is no warranty implied on the lease of a house or land that it is or shall be reasonably fit for habitation or cultivation. The implied contract relates only to the estate, not to the condition of the property.² On the other hand, one who lets a house ready furnished does so under the implied condition or obligation that the house is in a fit state to be inhabited forthwith;³ but in *Manchester Bonded Warehouse Company v. Carr*,⁴ the Common Pleas Division were “not prepared to extend these decisions to ordinary leases of lands, houses or warehouses, as we must if we are to hold the plaintiffs liable for the fall of this warehouse by reason of any implied covenant or warranty.” Certain floors in a warehouse were demised by the plaintiffs to the defendants, who covenanted to maintain the inside of the premises in good and tenantable repair and condition. The plaintiff covenanted to keep the walls, roof, and main timbers in good and substantial repair and condition. Sub-lessees of the defendant overloaded a floor with flour, in consequence of which the whole building fell. On these facts it was held there was no implied warranty by the

¹ Cp. *Barham v. Ipswich Dock Commissioners*, 54 L. T. 23. Cp. the Massachusetts case of *Bowe v. Hunking*, 135 Mass. 380, 46 Am. R. 471, and note at 474; also *Donaldson v. Wilson*, 1 Am. St. R. 487, and note at 489; *Eyre v. Jordan*, 33 Am. St. R. 543. For the cases about water penetrating demised premises through, a portion not demised, see *post*, 565. By the common law a lease for years is a transfer of the property, which remains at the risk of the lessee. The civil law, on the other hand, regards a lease for years as a mere transfer of the use and enjoyment of the property, and holds the landlord bound without any express covenant to keep it in repair and otherwise fit for use and enjoyment for the purpose for which it is leased, even when the need of repair or the unfitness is caused by an inevitable accident, and if he does not do so, the tenant may have the lease annulled or the rent abated. The Roman Civil Law authorities are reviewed, *Viterbo v. Friedlander*, 120 U. S. (13 Davis) 707, at 713.

² *Hart v. Windsor*, 12 M. & W. 68; see *Law Mag. N. S.* (1844) vol. i. 203. The English cases are reviewed in *Bowe v. Hunking*, 135 Mass. 380, 46 Am. R. 471, where it was held that a tenant cannot maintain an action against his landlord for an injury caused by falling upon a stair in the tenement, the tread of which had been sawed out and left unsupported by a previous tenant, there having been full opportunity to examine the stair at the time of hiring, and no warranty of the fitness of the tenement having been given by the landlord, the only evidence of knowledge on the part of the landlord being that he knew the stair had been sawed out, that he tried it and it bore his weight, and he thought it would bear anybody's weight. This was approved in *Doyle v. Union Pacific Railroad Company*, 147 U. S. (40 Davis) 413, where it was said that in the absence of fraud, misrepresentation, or deceit, a landlord is not responsible for injuries happening to the tenant by reason of a snowslide or avalanche. In the civil law *si saltum pascuum locasti, in pascuo herba mala nascebatur; hic enim si pecora vel demortua sunt vel etiam deteriora facta, quod interest præstabitur, si scisti; si ignorasti pensionem non petes*, D. 19, 2, 19, § 1.

³ *Smith v. Marrable*, 11 M. & W. 5; *Wilson v. Finch-Hatton*, 2 Ex. Div. 336. These cases are discussed in *Murray v. Albertson*, 50 N. J. (Law) 167, 7 Am. St. R. 787.

⁴ 5 C. P. D. 507, at 511; *Saner v. Bilton*, 7 Ch. D. 815.

plaintiffs that the building was fit for the purpose for which it was demised.

To this freedom from warranty of fitness there is one limitation. By the Housing of the Working Classes Act, 1890,¹ in any contract made after August 14, 1885, for letting for habitation by persons of the working classes a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for habitation.

Housing of the
Working
Classes Act,
1890.

The occupier of property cannot escape liability by the mere employment of another:

The owner of
property is
liable notwith-
standing the
employment of
another.

I. Where the work he imposes upon another is illegal.

II. Where injury arises from doing the very thing which he has delegated.

III. Where the thing to be done is a statutory duty imposed on him.

IV. Where the thing to be done is necessarily dangerous.

The cases are numerous and complicated, requiring careful consideration and analysis, and will be reviewed in their order.

In *Ellis v. Sheffield Gas Company*,² the work to be done was illegal, and the decision of the Court was that the shifting the doing an illegal act to other shoulders does not discharge the liability. With this may be contrasted *Hole v. Sittingbourne and Sheerness Railway Company*,³ where the work to be done—the building a bridge⁴—was authorized by Act of Parliament; but in the course of carrying out the contract an obstruction was occasioned which violated the Act of Parliament. The defendants having sought to evade responsibility by shewing that they had delegated their statutory duty to a contractor, it was pointed out by the Court that the company's statutory duty was absolute. They were to construct a bridge and to avoid obstructing the navigation. In the course of construction, and without negligence, an impediment was caused to the navi-

I. Where the
work to be
done is illegal
*Ellis v. Shef-
field Gas
Company.*
Where a legal
work is done
illegally:
*Hole v. Sitting-
bourne and
Sheerness
Railway
Company.*

¹ 53 & 54 Vict. c. 70, s. 75. To bring a house within the section the rateable value, if the hereditament is situated within the metropolis, must not exceed £20; if in Liverpool, £13; if in a parish wholly or partially in Manchester or Birmingham, £10; if elsewhere in England, £8; 32 & 33 Vict. c. 41, s. 3; and if in Scotland or Ireland, by 53 & 54 Vict. c. 70, s. 75, £4. As to right of tenant to sue his landlord under this provision, see *Walker v. Hobbs*, 23 Q. B. D. 458. In *Gott v. Gandy*, 2 E. & B. 845, a count in a declaration against the landlord by tenant from year to year of a house for neglecting to do substantial repairs to the premises after notice that they were in a dangerous state; *per quod* the premises during the tenancy fell and injured plaintiff's goods, was held bad, no obligation to do substantial repairs on notice being implied by law from the relation of landlord and tenant.

² 2 E. & B. 767. See also *Paterson v. Lindsay*, 13 Rettie, 261, where Lord Young expresses the view that any operations in the vicinity of private grounds which cannot be conducted without danger to persons in those grounds are illegal.

³ 6 H. & N. 488.

⁴ As to duty in constructing a bridge see *McCleneghan v. Omaha, &c., Railroad Company*, 13 Am. St. R. 508.

gation ; for this, the defendants would be liable, since it was directly caused by non-observance of their statutory duty, and was a positive act done in carrying out the plan fixed upon for the work, and not a merely negligent act collateral to the contract, the responsibility for which would turn on a question whether the relation of master and servant existed. Parliament had imposed a duty on the defendants which could not be discharged by making a contract with third parties, though as between contractor and owner the way of carrying out the work might no doubt give rise to a claim for damages.

II. Where injury arises from doing the very thing contracted to be done.

Pickard v. Smith.

The next case—*Pickard v. Smith*¹—raised the question whether the mere situation and circumstances of property, apart from any question of illegality or of statutory obligation, imports a similar duty paramount to contract. Defendant was the lessee of refreshment-rooms at a railway station ; the entrance to the coal cellar was by a trap-door on the platform. While a coal merchant by defendant's orders was shooting coals into the cellar, the trap-door was negligently left open and unguarded. Plaintiff, who was leaving the station in the usual way, fell into the hole and was injured. Defendant urged that the liability was either that of the railway company or of the coal merchant.² The Court held that it was defendant's obvious duty, if he used the hole in a way necessarily to create such danger, to take reasonable precautions not to injure persons lawfully using the platform ; he was not absolved from this duty by employing the coal merchant. The act the coal merchant was employed to do was to open the trap for the purpose of shooting coals down it, and the defendant must have trusted him to guard against accidents while it was open, and to close it when the work was done. The act of opening was, therefore, the very work to be done, and the defendant was bound to take reasonable means to avert evil consequences in doing it. "The performance of this duty he omitted, and the fact of his having entrusted it to a person who also neglected it furnishes no excuse either in good sense or law."

The particular facts proved shewed a hole in such an exceptional position that special precautions may well have been needed to prevent its being highly dangerous. Yet this was not

¹ (1861) 10 C. B. N. S. 470; *Threlkeld v. White*, 8 N. Z. L. R. 513.

² Williams, J., expressed an opinion that the coal merchant would not be liable. But on an action being brought against a coal merchant for the negligence of his carman in removing an iron plate in the footway, the Queen's Bench Division held that it was the common case of negligence by a servant in the scope of his employment, for which the master was responsible ; *Whiteley v. Pepper*, 2 Q. B. D. 276. As to a coal-cellar plate in a pavement insecurely fastened, *Braithwaite v. Watson*, 5 Times L. R. 331.

the ground on which the case was decided ; for in the course of the argument,¹ Williams, J., is reported to have said : “ The fact of the trap-door being on the platform of the railway makes no difference. Suppose the hole were in the foot pavement of a public way ; would not the housekeeper who employs the coal merchant to open it, and who trusts him to guard and to close it, be responsible ? ” And the answer is : “ No doubt he would.”

The case of *Pickard v. Smith* has been so repeatedly recognized that any discussion of the point decided there is now no more than academic. Nevertheless it may be pointed out that the distinction has been indicated as being between a work ordinarily and necessarily hazardous,² and one that may be performed without peril ; and not between the authorizing of an act, from which, in fact, danger flows, and an act to the negligent doing of which danger is incidental. If the former were the correct distinction, the moving of a coal-plate in the pavement for the shooting of coal and during the progress of the work, according to the ordinary usage of words, cannot appropriately be described as dangerous. In properly doing the act there is no risk. The danger arises from default of a responsible agent, who, by the use of the simplest precaution, could wholly obviate the possibility of danger.³ The principle applicable would rather seem to be that stated by Lord Westbury.⁴ “ The ordinary business of life could not go on if we had not a right to rely upon things being properly done when we have committed and entrusted them to persons whose duty it is to do things of that nature, and who are selected for the purpose with prudence and care, as being experienced in the matter, and are held responsible for the execution of the work. My Lords, undoubtedly, it would create confusion in all things if you were to say that the man who employs others for the execution of such a work, or the man who is a party to the employment, has no right whatever to believe that the thing will be done carefully and well, having selected with all prudence proper persons to perform the work, but that he is still under an obligation to do that which, to him, in many cases, would be impossible—namely, to interpose from time to time in order to ascertain that that was done correctly and properly, the business of doing which he had rightfully and properly committed to other persons.”

*Pickard
v. Smith
considered.*

Principle
enunciated by
Lord Westbury
in *Daniel v.
Metropolitan
Railway
Company.*

¹ 10 C. B. N. S. at 472.

² *E.g.*, *Hughes v. Percival*, 8 App. Cas. 443, at 451 ; *Dalton v. Angus*, 6 App. Cas. 740, at 829.

³ Per Lord Fitzgerald, *Hughes v. Percival*, 8 App. Cas. 443, at 452 ; and the opinions cited in the judgment of Holker, L.J., 9 Q. B. Div. 441, at 448 ; and especially the rule of liability stated by Lord Blackburn in *Dalton v. Angus*, 6 App. Cas. 740, at 829 ; *Dillon v. Hunt*, 24 Am. St. R. 374.

⁴ *Daniel v. Metropolitan Railway Company*, L. R. 5 H. L. 45, at 61.

Wider principle necessary than that enunciated in *Pickard v. Smith*.

The duty on the occupier to watch a coal hole while coal-men are shooting coals down it—a duty now firmly established by law—must, therefore, be referred to a wider principle than that of guarding against the consequences of acts ordinarily or necessarily hazardous; and must be held to come under a principle of this sort—that where injury has arisen from the doing of a delegated act, whether in itself dangerous or otherwise, is immaterial, if the act is one whereby in fact danger is caused, the liability attaches just as if there were no delegation. Nevertheless the class of acts which may be performed without danger, if the simplest and most ordinary means are used, would seem susceptible, apart from authority, of quite other regards than those in their nature dangerous, or calling for the exercise of exceptional care.

III. Where the duty on the owner is a statutory one. *Gray v. Pullen*.

In *Gray v. Pullen*¹ the obligation was a statutory one. By the Metropolis Local Management Acts, 1855² and 1862³ the defendant was empowered to make a drain from his premises to a sewer, and was “to cause the pavement to be reinstated and the surface to be made good in a proper and substantial manner.” He employed a contractor to do the work, who personally supervised its execution. A day or two before the accident there were heavy rains which caused the ground to sink and made a hole, into which the female plaintiff fell. Blackburn, J., ruled that as the work was done by a contractor, and as there was no evidence to go to the jury that the work had been done by a servant of the defendant, and as defendant had authority to cause the drain to be made under the statute, there was no case to go to the jury. This ruling was upheld on the ground that there was nothing to take the case out of the common doctrine that if a person, in the exercise of a right, either as a private individual or conferred by statute, employs a contractor to do work, and the contractor is guilty of negligence in doing it, from which damage results, he and not the employer is liable. The negligence alleged was plainly that of the contractor in the way he did the work; and not a danger arising from the doing of the work.

Hole v. Sittingbourne and Sheerness Railway Company distinguished.

*Hole v. Sittingbourne and Sheerness Railway Company*⁴ gave the Court some difficulty to distinguish. Cockburn, C.J., sought to do this by saying a statutory duty was imposed which was not discharged and mischief resulted, when it was no answer to say that the mischief arose by reason of the manner in which the duty was

¹ (1864) 5 B. & S. 970. That the work was done under statutory powers was the ground of the decision in *Barham v. Ipswich Dock Commissioners*, 54 L. T. 23. Cp. *City of Halifax v. Lordly*, 20 Can. S. C. R. 505.

² 18 & 19 Vict. c. 120.

³ 25 & 26 Vict. c. 102.

⁴ (1861) 6 H. & N. 488.

discharged by the contractor, while in the case before the Court (Gray v. Pullen) all that was meant was "that where persons in the exercise of the statutory power interfere with a public highway, they shall, as quickly as possible, fill up any opening they create in the surface, and make good what they had temporarily interfered with." Crompton, J., makes the suggestion that the real decision in Hole v. Sittingbourne and Sheerness Railway Company was that "where anything connected with the real property of a party is done in such a manner as to cause a nuisance, the person who does it is liable;" and Mellor, J., points out that "in Hole v. Sittingbourne and Sheerness Railway Company there was a perpetual obligation on the defendants. In the present case I agree there is no warranty from the defendant Pullen." Blackburn, J., did not give any reason discriminating the cases. The judgment of the Queen's Bench was, however, unanimously overruled by the Exchequer Chamber, who confirmed Hole v. Sittingbourne Railway Company and Pickard v. Smith, which they treated as undistinguishable, and held that the statutory duty was created absolutely.

In the case of a lamp hanging from the front of a house over the public way,¹ Lush, J., says: "Is it his [the defendant's] duty to maintain it in a safe state of repair, or only to employ a proper person to put it in repair? Surely the mere statement is enough to shew that the duty must be in the first proposition." Blackburn, J., puts the case: "If there were a latent defect in the premises, or something done to them without the knowledge of the owner by a wrongdoer, such as digging out the coals underneath, and so leaving a house near the highway in a dangerous condition." He answers, or evades answering, his problem thus: "I doubt—at all events I do not say—whether or not the owner would be liable."²

IV. Where what is done is necessarily dangerous or may become so if precaution is not taken. Tarry v. Ashton.

Two cases, Butler v. Hunter³ and Bower v. Peate,⁴ are so similar in their facts that they may be best considered together.

Butler v. Hunter and Bower v. Peate.

In Butler v. Hunter the plaintiff's and defendant's houses adjoined. In consequence of a fire it became necessary for the defendant to repair his house. He employed an architect, who found it necessary to pull down and rebuild the front. A contract

Butler v. Hunter.

¹ Tarry v. Ashton, 1 Q. B. D. 314, at 320; Silverton v. Marriott, 59 L. T. 61.

² See Hughes v. Percival, 8 App. Cas. 443, per Lord Fitzgerald, at 455: "He is not in the actual position of being responsible for injury, no matter how occasioned, but he must be vigilant and careful, for he is liable for injuries to his neighbour caused by any want of prudence or precaution, even although it may be *culpa levissima*." With these cases should be compared the cases treated in connection with Byrne v. Boadle, and Scott v. London and St. Katharine Dock Company, *ante*, 132.

³ (1867) 7 H. & N. 826.

⁴ (1876) 1 Q. B. D. 321.

was entered into with a builder to do the work. In doing it, the workmen removed a bressummer that was inserted in the party-wall of the two houses; in consequence of which removal the plaintiff's house fell. The work might have been done with safety if the plaintiff's house had been shored up. To shore up the house would have been the usual method of doing the work. It did not appear that the defendant knew anything about the work or the contract.

Bower v.
Peate.

In Bower v. Peate again, the plaintiff's and defendant's houses adjoined. Defendant, having determined to pull down his house, proposed to carry the foundations of a new one to a lower depth than his neighbour's. To do this it became necessary to underpin his neighbour's wall. A contract was entered into to do this at the risk of the contractor. Owing to defective underpinning or supporting the accident happened.

Butler v.
Hunter.

In Butler v. Hunter the proposition advanced was, that where a person employs a tradesman to do that which *may* be dangerous to another, he is bound to shew that he directed all care to be taken, and specifically pointed out in what way the danger was to be guarded against; or, at all events, to shew that he did enough to exempt himself from responsibility. But the Court held that as the accident had arisen, not from the act itself contracted to be done, but from "the improper mode in which it was done," the owner was not liable. Wilde, B., said:¹ "It seems to me that the absence of a shoring is like the absence of a proper hoarding, or any one of the ordinary precautions which belong to the careful taking down of a wall. Then it is said that the defendant ought to have given orders to do the work in a tradesmanlike way, or ought to have pointed out what was requisite. But it seems to me that it would be unreasonable to require an unskilled person to point out to a skilled person in what way the work should be done. I think that as a matter of fact if a man gives an order to a tradesman to do some work, he means him to do it in the ordinary and tradesmanlike way."

Judgment of
Wilde, B.

Judgment of
Cockburn, C.J.,
in Bower v.
Peate.

In Bower v. Peate² the judgment was delivered by Cockburn, C.J., who affirms the proposition that "a man who orders a work to

¹ 7 H. & N. 826, at 833. In the course of the argument he had asked, at 829: "Suppose a person employed a contractor to pull down a house, and he omitted to put up a hoarding so as to prevent bricks falling on persons passing, who would be liable?"

² See Blake v. Ferris, 5 N. Y. 48, at 61. Per Thesiger, L.J., in Angus v. Dalton, 4 Q. B. Div. at 184: "It is properly admitted by the defendant's counsel that the case of Bower v. Peate is undistinguishable from the present, and I am of opinion that the law there laid down by the Lord Chief Justice, in delivering the considered judgment of the Court, is correctly stated and placed upon proper principles." Per Cotton, L.J., at 188: "I agree with the decision in Bower v. Peate." Per Lord Selborne, C., in Dalton v. Angus, 6 App. Cas. at 791: "It follows from that decision [Bower v. Peate], as to the correctness of which I agree with both the Courts below."

be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.” The dividing line of the cases is indicated by the Chief Justice as determined by the test whether the work is such that if it be done carefully, no injurious consequences can arise; or whether it is such that injurious consequences will arise unless precautionary measures are adopted. It is strange that *Butler v. Hunter* does not appear from the report to have been cited in the argument. The two cases have subsequently been treated as not consisting well together.

In *Dalton v. Angus*, Lord Blackburn, reviewing the cases, Lord Blackburn in *Dalton v. Angus*; says:¹ “Ever since *Quarman v. Burnett*² it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it: *Hole v. Sittingbourne Railway Company*,³ *Pickard v. Smith*,⁴ *Tarry v. Ashton*.⁵ I do not think either side disputed these principles, nor that, in *Bower v. Peate*,⁶ the Queen’s Bench Division thought that the case of a man employing a contractor to excavate near the foundation of a house which had a right of support, fell within the second class of cases; nor that, if correctly decided, that case was decisive. But *Butler v. Hunter* was relied on, which case the Court of Exchequer held fell within the first class of cases. I am not quite sure that I understand from the report what the state of the evidence was. But, assuming that the defendants are right in saying that it was such as to make the case not dis-

¹ 6 App. Cas. 740, at 829.² 6 H. & N. 488.³ 1 Q. B. D. 314.⁴ 6 M. & W. 499.⁵ 10 C. B., N. S., 470.⁶ 1 Q. B. D. 321.

Hughes v.
Percival.

tinguishable from *Bower v. Peate*, I think that the reasoning in *Bower v. Peate* is the more satisfactory of the two." Again, in *Hughes v. Percival*, Lord Blackburn,¹ having read the principle already quoted from the judgment of Cockburn, C.J., adds: "I doubt whether this is not too broadly stated. If taken in the full sense of the words, it would seem to render a person who orders post-horses and a coachman from an inn bound to see that the coachman, though not his servant, but that of the innkeeper, uses that skill and care which is necessary when driving the coach to prevent mischief to the passengers. But the Court of Queen's Bench had no intention, and, indeed, not being a Court of error, had no power, to alter the law as laid down in *Quarman v. Burnett*. . . . It is not necessary now to inquire how far this general language should be qualified. I do not think the case of *Butler v. Hunter* is consistent with my view of the law. I do not know whether the Court of Exchequer meant to deny that such a duty was cast upon the defendant in that case, or meant to say that he might escape liability by employing a contractor. If either was meant by the Court of Exchequer, I am obliged to differ from them."

II. WITH REGARD TO PERSONS RESORTING TO PREMISES.

Subject dis-
tributed.

Besides the duties already enumerated, there are others which fall upon occupiers of fixed property with reference to persons resorting thereto, either of their own mere will or in the course of business upon invitation, express or implied.

I. Where persons are trespassers upon property.

II. Where persons using premises are bare licensees or volunteers.

III. Where persons using premises go upon business which concerns the occupier, and upon his invitation, express or implied.

Before proceeding to this inquiry, certain methods of protecting property must be noticed which are against public policy, and to which accordingly resort is not to be had.

Trespass.

"It will be a trespass," says Comyns,² citing Fitzherbert,³ "if a man wrongfully enters the house, lands, or tenements of another without his consent; and therefore trespass lies *de domo sua fracta*."⁴

¹ 8 App. Cas. 443, at 447; *Black v. Christ Church Finance Company* (1894), App. Cas. 48. In *Lemaitre v. Davis*, 19 Ch. D. 281, both employer and contractor were held liable for damage done to the vault of a neighbour's house. See *Upton v. Townend*, 17 C. B. 30; also *Tone v. Preston*, 24 Ch. D. 739. The Prescription Act 1832 (2 & 3 Will. IV., c. 71) was considered in *Lemaitre v. Davis*, *supra*.

² Dig. Trespass (A. 2).

³ De Natura Brevium, 87 D.

⁴ 2 Roll. Abr. 565.

To the universality of this rule there are exceptions. In 37 H. VI. ^{Trespass, when excused.} 37, pl. 26, it was said if a man who is assaulted and in danger of his life, run through the close of another without keeping in a footpath, trespass does not lie; for the doing this being necessary for the preservation of life is lawful; or, if one enter on another's land to succour the owner's beast, the life of which is jeopardized, trespass does not lie, because the owner's loss is irremediable if the beast died; but trespass lies if the loss is not irremediable, as for entering to prevent the beast being stolen or the owner's corn from being trampled or eaten.¹ A man may enter the land of another to recover his beast that has been stolen, though not to recapture one that has been removed to the land of another, not feloniously;² unless the beast has been driven there by the owner of the land;³ but he may not enter to look for a beast he has lost.⁴ Again, if a tree belonging to one person is blown down on the land of another, the owner may enter to take it away; also fruit falling from the tree of one man on the land of another may be gathered by the owner with impunity, so far as, and because, the falling there could not be prevented;⁵ yet if the loppings of a tree fall on the land of another, an action lies if their falling could be prevented by proper care.⁶ "So where my beasts are doing damage in another man's land, I may not enter to drive them out; and yet it would be a good deed to drive them out so that they do no more damage; but it is otherwise if another man drive my horses into a stranger's land, where they do damage; there I may justify entry to drive them out, because their wrongdoing took its beginning in a stranger's wrong. But here, because the party might have his remedy if the corn were anywise destroyed, the taking was not lawful. And it is not like the case where things are in danger of being lost by water, fire, or such like, for there the destruction is without remedy against any man."⁷ The same distinction is pointed in Y.B. 38 E. III. 10 b., where it is said that if a man flies his hawk at a pheasant on his own ground, and the hawk pursues the pheasant into another's warren, the owner of the hawk cannot justify entering the warren and taking the pheasant. There is a somewhat subtle distinction between this and what was agreed by the whole Court in *Sutton v. Moody*,⁸

¹ Y. B. 21 H. VII., 27, pl. 5.

² *Higgins v. Andrewes*, 2 Roll. Rep. 55.

³ 2 Roll. Abr. 565, pl. 9. Cp. Y. B. 9 E. IV. 35, pl. 10, per Littleton, J.

⁴ *Toplayde v. Stayle*, Style 165.

⁵ *Millen v. Fawdry*, Latch 120.

⁶ Y. B. 6 E. IV. 7 pl. 18. See *post*, Book IV. chapter i. : Duty to answer for one's own acts.

⁷ Per Rede, J., Y. B. 21 H. VII., 27 pl. 5.

⁸ 1 *Ld. Raym.* 250, where all the old authorities are collected. Holt, C.J., follows Y. B. 12 H. VIII., 9 pl. 2.

that if a man pursues deer, hares, or conies out of his land or the lands of another into mine, and there takes them, they are the hunter's, and not mine. There is no right to enter the land in either case. If the trespass is already complete the game may be carried away. Yet where the hawk has killed the pheasant, the owner of the hawk not being by, it is a trespass to enter the land to claim the pheasant.

Trespassers
upon property.

I. Where persons are trespassers upon property.

Under the head a series of cases must be noticed concerned, primarily, not with the trespassers of persons, but of dogs.

Townsend v.
Wathen.

The first of these is *Townsend v. Wathen*.¹ Defendant placed traps baited with flesh so near the plaintiff's courtyard, where his dogs were kept, that they could scent the bait without going upon the defendant's premises. Several of the plaintiff's dogs having been thus enticed into the traps, and thereby injured, the plaintiff brought his action. The Court of King's Bench held that he might recover, on the ground that the defendant must be considered to have contemplated the probable consequence of his act; and, his purpose being to catch dogs, he must be held to have malice against those special dogs which came into his traps. "What difference," says Lord Ellenborough, C.J.,² "is there in reason between drawing the animal into the trap by means of his instinct, which he cannot resist, and putting him there by manual force?"

Deane v.
Clayton.

The earlier authorities were cited and elaborately examined in the somewhat unsatisfactory case of *Deane v. Clayton*.³ The facts were found by a special verdict: A large tract of woodland belonging to the defendant adjoined upon a piece of woodland belonging to a gentleman named Townsend. A low bank or mound of earth and a shallow ditch marked the boundaries of the respective estates, but was not a sufficient fence to prevent dogs passing from one woodland to the other. Through the defendant's woodland there were public paths not

¹ (1808) 9 East 277. An attempt was made, on the authority of this case, in *Stansfeld v. Bolling*, 22 L. T. (N. S.) 799, to render a confectioner liable for the death of a dog of a customer which got behind the counter and ate some poison put for rats and mice. The Court, however, negatived the right of action. *Townsend v. Wathen* was distinguished in argument on the ground that there the enticement was made to operate beyond the defendant's property, but there was no decision against an allurement not calculated to act beyond the limit of the premises. In *Janson v. Brown*, 1 Camp. 41, defendant justified shooting a dog because the dog was worrying his fowl and could not otherwise be prevented, it was held, however, that he must prove that the dog was in the act of worrying the fowl at the moment he was shot. See note in 1 Camp. 41; also *Vere v. Lord Cawdor*, 11 East 568, where Lord Ellenborough held a game-keeper had no right to shoot a dog following a hare; Com. Dig. Pleader (3 M. 33).

² 9 East 277, at 281.

³ (1817) 7 Taunt. 489, 2 Marsh. 577, where the arguments of counsel are given which the learned reporter in 7 Taunt. regrets he is unable to give; see also 1 Moore (C P.) 203.

fenced from the rest of the land. The defendant, for the preservation of hares in his woodland, and to prevent them from being killed by dogs and foxes, and for the purpose of wounding and killing dogs and foxes that might come into his woodland in pursuit of hares, caused several iron spikes, called dog-spears, to be screwed and fastened into several of the trees in the woodland, and had them purposely placed at such a height as to allow a hare to pass under them without injury, but to wound and kill a dog that might happen to come against one of the sharp ends. None of the spikes was at a less distance than fifty yards from the public footpath. The defendant had also caused notices to be painted on boards outside his premises—"Take notice, that steel-traps and spring-guns and dog-spears, are set in these woods and premises." The plaintiff, by the consent of Townsend, went into Townsend's woodland, accompanied by a pointer dog, for the purpose of sporting. A hare rose in Townsend's grounds, and was seen and pursued by the plaintiff's dog. The hare ran and was pursued over the mound into the defendant's woodland, and ran against one of the sharp ends of the spikes, and was thereby killed. The plaintiff endeavoured as much as he could to prevent the dog from pursuing the hare into the defendant's woodland, but was unable to do so.

On these facts Burroughs and Park, JJ., were of opinion the plaintiff could recover the value of the dog; while Dallas, J., and Gibbs, C.J., held an action was not maintainable. Division of opinion.

Burroughs, J., relied on three principles—First, the acts of the defendant were unlawful, and the plaintiff, having sustained an injury thereby without any default in him, was entitled to maintain an action; secondly, if the plaintiff had been a trespasser, the defendant could not justify the direct killing of the dog; thirdly, the defendant was not warranted in doing indirectly what he could not do directly. Park, J., followed the same lines, and added, referring to the previous case: "Two things here concur which Lord Ellenborough requires to support such an action—of fault in the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." Three principles. asserted by Burroughs, J., and approved by Park, J.

Dallas, J., was of a contrary opinion.¹ As to the first of Dallas, J.'s, principles, he said: "If I place a log across a public path, and injury be thereby sustained, the soil being my own, but the public or individuals having a right of way over it, an action will lie, because there is a right in others to pass along without interruption; but if there be no right of way, I may, with any view and for any purpose, place logs on my Dallas, J.'s, judgment to the contrary.

¹ 7 Taunt. 489, at 522.

own land, and a party having no right to be there, and sustaining damage by his own trespass, cannot bring an action for the damage so sustained. . . . No decision has established that a trap placed by a man in his own land, and not calculated to operate so as to allure beyond, or even within the limit of such land, would be a trap unlawfully placed." There is a broad distinction between what a man can do when he is present and when he is absent for the protection of his property. "Presence" in its very nature is more or less protection; absence is abandonment and dereliction for the time. Presence may supply means, and limit what it supplies; but if, during absence, property can only be protected by such means as may be resorted to in the case of presence, all property lying open to inroad can have no protection, at least by any act of the party himself; for to say that he can only be protected when absent by such means as he could use if present is a contradiction in the nature of things." As to the second of Burroughs, J.'s, principles—which of course could not be controverted but so far only as it was made effectual by the third—"Is it illegal," says Dallas, J.,¹ "to place spikes or glass upon a wall? And if the party climbing over be thereby wounded or cut, can he bring an action? And yet if I were to see a trespasser coming down my area, or getting over the garden wall, I could not drive the spike into his hand or cut him with the glass. Or (to bring it home to the present case) suppose that, in order to separate his property from that of his neighbours, the defendant had erected a wall, and put spikes and glass upon it, and that the plaintiff had been wounded in attempting to get over, could this action have been maintained? If not, where is the distinction between spikes on the ground, with notice that they are there, or notice given by the visibility of the spikes themselves?" Dallas, J., also dissented on the narrower ground² that the spears having been placed for the destruction of foxes, the immediate object being the preservation of hares, and being to that extent legal, could not become unlawful because by possibility, and against the original intent, the death of a dog had been induced.

Gibbs, C.J.'s,
opinion.

Gibbs, C. J., took the same view as Dallas, J., because what was done was "done on defendant's own land, and could not molest any other man in the exercise of any legal right;" and, if it was unlawful, "it follows that the plaintiff must have a right to enter and remove the spears, for then they are an abateable nuisance. In other words, he may justify a trespass on my land to secure a safe passage for his dogs in their subsequent aggressions thereon."

¹ 7 Taunt. 489, at 521.

² *L. c.* at 526.

Further, "the true test, by which to try whether such an action as the present be maintainable or not, is to ask, whether the man or animal that suffered, had or had not a right to be where he was when he received the hurt."¹

No judgment was given, and the plaintiff did not think fit to avail himself of the suggestion of Burroughs, J., who offered to withdraw his judgment to enable him to appeal.

In *Ilott v. Wilkes*,² tried before Garrow, B., the learned judge, *Ilott v. Wilkes.* considering that the same question was involved as was under the consideration of the Court of Common Pleas in *Deane v. Clayton*, directed the jury to find a verdict for the plaintiff, and reserved to the defendant liberty to move to enter a nonsuit. The jury found, in addition, that the plaintiff had knowledge that there were spring-guns in a wood, and entered the wood, and in the exercise of a right, but to gather nuts, and where there was no pathway. The King's Bench thereupon declined to consider the general question as to the liability incurred by placing such engines as spring-guns where no notice is brought home to the party injured, and decided the case merely on the ground that the plaintiff had notice of their being on the ground, and had no business to go there.³

By the 7 & 8 Geo. IV. c. 18,⁴ the use of spring-guns calculated to destroy human life or to inflict grievous bodily harm, with the intent to injure trespassers, was prohibited, unless for the protection of a dwelling-house in the night-time. This Act rendered the decision of what were the common law rights of property owners with regard to the setting of spring-guns, &c., only of importance in cases that had occurred previously to its passing.

Bird v. Holbrook,⁵ however, was such a case. The question there was whether it was incumbent on a person, who had set a spring-gun in a walled garden at a distance from his house, to

¹ 7 Taunt. 489, at 533.

² (1836) 3 B. and Ald. 304. See the article in 35 Edin. Rev. 123, "Spring Guns and Man Traps," also "Man Traps and Spring Guns," reprinted in Sydney Smith's works, and probably the motive force of the enactment, 7 & 8 Geo. IV. c. 18, superseded now by 24 & 25 Vict. c. 100, s. 31.

³ Some discussion must have taken place on the question of humanity, for Best, J., says, 3 B. & Ald. at 319, "Humanity requires that the fullest notice possible should be given, and the law of England will not sanction what is inconsistent with humanity." Abbott, C.J., answers him at 309 by anticipation thus: "Nor are we called on to pronounce any opinion as to the inhumanity of the practice, which in his case has been the cause of the injury sustained by the plaintiff. That practice has prevailed extensively and for a long period of time, and although undoubtedly I have formed an opinion as to its inhumanity, yet at the same time I cannot but admit that repeated and increasing acts of aggression to property may perhaps reasonably call for increased means of defence and protection." Best, J., was apparently proud of his sentiment, for he recurs to and repeats it in *Bird v. Holbrook*, 4 Bing. 628, at 641.

⁴ See now 24 & 25 Vict. c. 100, s. 31.

⁵ (1828) 4 Bing. 628.

Best, C.J.'s,
judgment.

give notice of what he had done. The Court included Best, C.J., counsel for the plaintiff in *Deane v. Clayton*, and Burroughs and Park, JJ., who had given judgments in favour of the plaintiff in that case; and they took the opportunity of reiterating the contention they had there advanced. The ground of the decision is thus put by the Chief Justice: "We want no authority in a case like the present; we put it on the principle that it is inhuman to catch a man by means which may maim him or endanger his life, and, as far as human means can go, it is the object of English law to uphold humanity and the sanctions of religion."¹ Another ground is that on which Gaselee, J., exclusively based his judgment that it was impossible, after *Ilott v. Wilkes*, to hold otherwise than that notice was necessary. But *Ilott v. Wilkes* was the case where, assuming notice to have been given, it was contended that, in spite of the notice, the defendant was liable. The present case was not, therefore, necessarily concluded by the decision; for a decision, that where notice had been given of the placing of a spring-gun the defendant is not responsible, does not decide the case whether, where no notice of the placing of a spring-gun has been given, the defendant was responsible. Abbott, C.J., says definitely:² "Considering the present action merely on the ground of notice, and *leaving untouched the general question as to the liability incurred by placing such engines as these where no notice is brought home to the party injured*, I am of opinion that this action cannot be maintained." Bayley, J., says: "The declaration *assumes* the law to be, not that the mere act of placing these guns in a man's own ground is illegal and punishable by indictment, but that a party doing that act may be liable to an action provided he does not take due and proper means, by giving notice, to prevent the injury which those engines are calculated to produce."³ Holroyd, J., says: "*Without giving any decided opinion upon that point*" (i.e., whether placing spring-gun on property from which injurious consequences result to a trespasser without notice is a lawful act), "but assuming, for the present, that would be so, it seems to me that a party having

Abbott, C.J.,
in *Ilott v.*
Wilkes.

Bayley, J.,
in *Ilott v.*
Wilkes.

¹ 4 Bing. 628, at 643. At this time of day it may be worth while to recall, though it is needless to comment on, another of the general principles by which the Chief Justice buttressed his judgment: "It has been argued that the law does not compel every line of conduct which humanity or religion may require; but there is no act which Christianity forbids that the law will not reach; if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England." As to this last proposition see the argument of Sir Samuel Romilly, *Att.-Gen. v. Pearson*, 3 Meriv. 353, at 379, and the note, in which the history of the theory is set out and the cases collected; also *Shore v. Wilson*, 9 Cl. & F. 355; and a very able pamphlet by the late Lindsey Middleton Aspland, Q.C., entitled "The Law of Blasphemy," 1884.

² 3 B & Ald. 304, at 310.

³ L. c. at 312.

express notice that the spring-guns were placed in a particular ground, and entered upon that place as a trespasser, stands in a very different situation." We may hence conclude that the majority of the Court did not even express an opinion upon what Abbot, C.J., calls the "general question," and that the argument from authority used in *Bird v. Holbrook* was a straining of the expression in the earlier case.¹

*Jordin v. Crump*² raised again the question in *Deane v. Clayton*. The plaintiff was walking with his dog along a public footway through a coppice of the defendant's in which, to the knowledge of the plaintiff, there were dog-spears. The dog broke from plaintiff's control, and, while chasing a rabbit into the coppice, was injured by running against a dog-spear. The Court, in a considered judgment, held that the plaintiff could not recover; "and we shall merely content ourselves with saying that we take the same view of the law on this subject as if there taken [in *Deane v. Clayton*] by Gibbs, C.J. But the present case is much stronger than that; for here the plaintiff had express notice that dog-spears were set in the wood; though, were this even otherwise, our decision would still be in favour of the defendant, on the short ground that the setting of them was a lawful act, and that the accident occasioned by them was the act of the dog, not of the defendant, and that the plaintiff was bound to keep his dog on the footpath." As to *Bird v. Holbrook*, the Court said: "The reason of this decision was that setting spring-guns without a notice was, even independently of the statute, an unlawful act. The correctness of that position may perhaps be questioned; but, if it be sound, the decision in that case was right."

The subsequent case of *Wootton v. Dawkins*,⁴ which in its leading features closely resembles *Bird v. Holbrook*, is an additional authority for the view taken in *Jordin v. Crump*. The declaration alleged that plaintiff entered the defendant's garden at night, and without permission, to search for a stray fowl, and whilst looking into some bushes he came in contact with a wire, which caused *something* to explode with a loud noise, and to knock him down, and to injure his face and eyes. A rule was, in the first instance, moved for in the Court of Queen's Bench, but was refused, on the ground that under the statute⁵ it was not enough that the instrument was one calculated to create alarm,

¹ *L. c.* at 314.

² (1841) 8 M. & W. 782.

³ The judgment was given by Alderson, B.

⁴ (1857) 2 C. B. N. S. 412.

⁵ 7 & 8 Geo. IV. c. 18, s. 1.

but must be calculated to destroy human life, or to inflict grievous bodily harm ; of which there was no evidence ; while at common law there was no cause of action at all. The Court of Common Pleas was subsequently moved, on the ground that the rule had been moved in the Queen's Bench by mistake ; but they declined to grant a rule, holding that the conclusion of the Court of Queen's Bench was correct. Thus, the three Courts of Queen's Bench, Common Pleas, and Exchequer have successively declined to follow the doctrines laid down in *Bird v. Holbrook*, which must therefore be considered as overruled.

We may conclude, then—

Summary.

First, that at common law the placing of instruments in the nature of spring-guns, dog-spears, &c., on a man's land is not unlawful, provided only that they were not placed so as to be a peril to the enjoyment of the rights of other persons,¹ or in the nature of a trap.²

Secondly, that by statute³ the use of spring-guns is unlawful in so far as such use of them is calculated to destroy human life or inflict grievous bodily harm on trespassers not in a dwelling-house and in the night-time.⁴

Thirdly, that the setting up on a man's own land of dog-spears and such instruments, not contained in the statutory exception against instruments, capable of causing deadly injuries to human life, is a lawful user of land, even where injury will be a probable consequence of setting them.⁵

Not only must the owner not protect his property in every conceivable mode, but only in those modes which do not offend against the principles of existing public sentiment ; he must also, in certain cases, take positive measures for the protection, not merely of those who are induced to enter upon his lands by his invitation or acquiescence, but even of those who are upon his land without invitation and even to his detriment.

Duty where lands are adjacent to a public way.

This duty arises principally where lands are adjacent to a public way. In *Jordin v. Crump*,⁶ Alderson, B., had said : "The case is similar to that of a man who, passing in the dark along a footpath, should happen to fall into a pit dug in the adjoining field by the owner of it. In such a case the party

¹ *Barnes v. Ward*, 9 C. B. 392.

² *Townsend v. Waihen*, 9 East 277.

³ 24 & 25 Vict. c. 100, s. 31.

⁴ "If a man commits a trespass to land, the occupier is not justified in shooting him, and probably if the occupier were sporting or firing at a mark on his land and saw a trespasser and fired carelessly and hurt him, no action would lie" : per Bramwell, B., *Degg v. Midland Railway Company*, 1 H. & N. 773, at 780.

⁵ *Bac. Abr. Trespass (F.)*. For what Injuries to Real Property an Action of Trespass lies, contains a large collection of the early cases on the point.

⁶ 8 M. & W. 782, at 787.

digging the pit would be responsible for the injury if the pit were dug across the road; but if it were only in the adjacent field the case would be very different, for the falling into it would then be the act of the injured party himself."

In reliance on this *dictum*, the proposition was maintained in *Barnes v. Ward*¹ that there is no common law duty upon an owner of land adjoining a highway to guard or to fence a ditch or area upon his own land. After consideration and re-argument, the Court held that where a newly made excavation adjoining the highway renders the way unsafe to those who use it with ordinary care, a duty to fence it arises. The cases were classified into, first, those where the existence of a hole adjoining a road is not dangerous to the persons and cattle of those passing along;² secondly, those where the hole may interfere with the rights of those passing along.³

The test is not whether the plaintiff is a trespasser or not,⁴ but is the excavation so near the highway as to interfere with the ordinary user of the same by the public. Thus, in *Hardcastle v. South Yorkshire Railway Company*, Pollock, C.B., said:⁵ "When an excavation is made adjoining a public way so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or, in the case of a horse or carriage way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different." "A man getting off a road on a dark night and losing his way

¹ (1850) 9 C. B. 392; *Orr Ewing v. Colquhoun*, 2 App. Cas. 839, at 864. *Sarch v. Blackburn*, 4 C. & P. 297, was a dog case; there Tindal, C.J., said, at 300; "Undoubtedly a man has a right to keep a fierce dog for the protection of his property; but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose may be injured by it."

² *Blythe v. Topham*, 1 Roll. Abr. 88; *Si A, seisie dun wast adjacent al un haut chemin fode un pit en le wast deins 36 pees del dit chemin et le mare de B. escape en le dit wast, et decade en le pit et la morust, uncore B. n'avera ascun action vers A., pur ceo que le fesans del pit en le wast et nemy en le haut chemin ne fuit ascun tort al B. mes ceo fuit le defalt de B. mesme que son mare escape en le wast*: Cro. Jac. 158.

³ *Coupland v. Hardingham*, 3 Camp. 398; *Jarvis v. Dean*, 3 Bing. 447, where it was assumed as a matter beyond dispute that the action was well founded, supposing the road was shewn to be a public one: per Pollock, C.R., *Firmstone v. Wheeley*, 2 D. & L. 203, at 208; *Wright v. Midland Railway Company*, 51 L. T. 539.

⁴ "A trespasser is liable to an action for an injury which he does; he does not forfeit his right of action for an injury sustained": *Barnes v. Ward*, 9 C. B. 392, at 420. *Silverton v. Marriott*, 59 L. T. 61.

⁵ (1859) 4 H. & N. 67, at 74: *Stone v. Jackson*, 16 C. B. 199; *Pearson v. Cox*, 2 C. P. D. 369. Plaintiff's servant, while driving plaintiff's horses along a road not dedicated to the public, drove into a trench dug for the purpose of making drains, and unlighted. Held, there was no duty on the owner to protect any one using the road without licence: *Murley v. Grove*, 46 J. P. 360.

Hounsell v.
Smyth.
Binks v.
South York-
shire Railway
and River Dun
Company.

M'Feat v.
Rankin's
Trustees.

Views of the
Lord Justice-
Clerk
(Moncreiff).

may wander to any extent, and if the question be for the jury no one could tell whether he was liable for the consequences of the act upon his own land or not. We think that the proper and true test of legal liability is whether the excavation be substantially adjoining the way, and it would be dangerous if it were otherwise—if in every case it was to be left as a fact to the jury, whether the excavation were sufficiently near to the highway to be dangerous.”¹ *Hounsell v. Smyth*,² the case of an excavation on a waste between two roads, and *Binks v. South Yorkshire Railway and River Dun Company*,³ the case of a canal twenty-four feet from a pathway, which twenty-four feet had been trampled down and made indistinguishable from the pathway, were decided on the authority of the earlier cases.

There is a Scotch case⁴ which must be mentioned on account of its utter variance with all the authorities, and as a sample of what at a past period of Scotch legal history was known as “Second Division law.” A proprietor let the right of digging fire-clay on his lands to a brick manufacturer, with leave to him to erect works and houses, and to make roads in connection with his operations. The tenant erected his works and built houses for his workmen near an unfenced quarry on the lands, remote from any public way, but which was being worked in the ordinary manner. The road or path used by the workmen in going to the works from the houses passed within twelve feet of the quarry. The pursuer, one of the brick manufacturer’s workmen, resided in one of the cottages in full view of the quarry; as Lord Gifford expressed it, “seeing it every day and almost every hour of his life. After living there some time—it does not appear how long—on the morning in question, and after having slept in another cottage not his own, he stumbles into the open quarry in question—an open quarry which had always been there and which had never been enclosed.” The pursuer brought his action against the landlord, alleging a neglect of duty to fence. The Second Division of the Court of Session, Lord Gifford doubting, affirming the sheriff and sheriff-substitute, held the pursuer entitled to recover. The doctrines propounded by the Lord

¹ The principle that if the excavation is substantially adjoining the highway, the landowner is liable, was declared to be the Scotch rule in *Prentices v. Assets Railway Company Limited*, 17 Rettie 484. The dictum in *Hislop v. Durham*, 4 Dunlop 1168, importing a duty to fence a disused quarry, is dissented from in *Prentices v. Assets Company*; the Lord President (Inglis) saying: “I entertain strong doubts whether the words were ever spoken by his Lordship (Lord President Boyle). It would be surprising if such a startling proposition of law had been accepted,” &c.

² (1860) 7 C. B. N. S. 731.

³ 3 B. & S. 244; *Hadley v. Taylor*, L. R. 1 C. P. 53, was the case of a “hoist-hole” within fourteen inches of the public way, and unfenced. Willes, J., referred with approval to the rule laid down in *Binks v. South Yorkshire Railway Company*.

⁴ *M'Feat v. Rankin's Trustees*, 6 Rettie 1043.

Justice-Clerk (Moncreiff) may serve as a foil to illustrate the principle of the English authorities. Where, says he, the landlord "uses his land so as to bring a concourse of people to it, then he must remove any existing danger. Suppose a church or a school had been built on this piece of ground, would the proprietor have been entitled in such case to have this quarry unfenced? *No proprietor is entitled to give liberty which exposes the persons taking advantage of it to danger.*" "But there are points in this case which take it out of that category altogether. A right to make roads is expressly given in the lease—rent is paid on that footing. *The landlord, therefore, who was a party to that lease, was bound to fence this dangerous quarry.*" "Again, the increase of the danger is of great importance. The quarry did not remain in the state it was in when the cottages were built. It had been enlarged, and that in the direction of the cottages. In the third place, *this is not the first accident of a similar nature which has occurred here. The defenders thus had warning that this was a dangerous place.*" Whether as law or logic, this decision seems equally noteworthy.

As to the Lord Justice-Clerk's first point, Williams, J., in *Hounsell v. Smyth*,¹ answered it by anticipation: "Suppose a person gives another leave to walk on the edge of a cliff, surely it would be unjust to say that such permission throws on the proprietor of the land the burden of fencing the cliff. Nor can it make any difference that there is a high road open to but at some distance from the cliff." And the cases presently to be considered—under the heading of what the duty of an occupier of property is to licensees on his property²—shew clearly that there is no shadow of authority for it in English law; while Fry, L.J., subsequently uses it as an illustration of an incontrovertible principle:³ "If I invite a man who has no knowledge of the locality to walk along a dangerous cliff which is my property, I owe him a duty different to that which I owe to a man who has all his life birdnested on my rocks."

Lord Justice-Clerk Moncreiff's views examined.

The second point appears to involve a major proposition that where by lease for valuable consideration a right to make roads over land is given, the person granting the lease is bound to fence all places on his property possibly dangerous, in case the lessee should make one of the roads he is empowered to construct under the lease near to any of such places. Assuming any obligation of this sort under a lease, it is going a long way to

¹ 29 L. J. C. P. 203 at 207.

² *Post*, 523. Per Cockburn, C.J., *Gallagher v. Humphrey*, 6 L. T. (N.S.) 684.

³ *Thomas v. Quartermaine*, 18 Q. B. Div. 685, at 701.

give the benefit of the implied covenant to one not a party to it or taking any interest under it or with reference to it. However, the proposition itself is wholly contradictory to English authority.¹

The third point again involves an illicit assumption—viz., that knowledge of a danger is correlative with a legal duty to take precautions against it.

Lord Gifford's remark is very good sense, and, in England at any rate, very good law: "Dunnachie, the clay tenant, had power to build by his lease, and he chose to build his workmen's cottages upon the clayfield, and in dangerous proximity to the open stone quarry. Now, if Dunnachie chose to do this I think he was bound to fence his own cottages and the roads to them, so as to make them safe for his own workmen, and I have a difficulty in seeing how and when the defenders became liable to make safe roads to cottages which they did not build, which they were not bound to maintain, and which, I suppose, Dunnachie might remove at his own pleasure."

Different test
in the United
States cases.

In some of the United States cases a somewhat different test from that adopted in England is prescribed in the case of an excavation near a highway. In Connecticut, for example, the defendant's liability is made to depend upon the dangerous condition in which an excavation is left, rather than upon any question of distance from the street. The dangerous character rather than the exact situation of the excavation determines the duty with regard to it. "Whether the excavation could, with a due regard to the rights of passengers on the street, be left unguarded or could not, depended upon the question whether, being unguarded, it endangered the travel or not; if it did not, no matter how near it was to the line of way; if it did, no matter how far it was removed."² The ground of this difference is, however, thus explained:³ "While, then, we reject the rigid test of liability propounded by the English judges, it will be perceived that the difference between us arises out of the operation of our statute rather than from any difference of opinion in relation to the principles of the common law applicable in cases of this kind."

In *Hayes v. Michigan Central Railroad Company*⁴ the true test is determined to be "not whether the dangerous place is outside of the way, or whether some small slip of ground not included in the way must be traversed in reaching the danger,

¹ *Erskine v. Adeane*, L. R. 8 Ch. 756; *Sutton v. Temple*, 12 M. & W. 52; *Hart v. Windsor*, 12 M. & W. 68; *Keates v. Earl Cadogan*, 10 C. B. 591.

² *City of Norwich v. Breed*, 30 Conn. 535, at 545; *Croghan v. Schiele*, 53 Conn. 186. See *Mistler v. O'Grady*, 132 Mass. 139.

³ 30 Conn. 535, at 549.

⁴ 111 U.S. (4 Davis) 228, 236, following *Hoar, J.*'s definition in *Alger v. City of Lowell*, 85 Mass. 402.

but whether there is such a risk of a traveller, using ordinary care, in passing along the street, being thrown or falling into the dangerous place, that a railing is requisite to make the way itself safe and convenient." There is a limitation, however, which must be carefully marked. The fact that a man's property abuts on the highway is not a reason why he should be restricted in the natural and beneficial use of it. In accordance with this principle, both the owner and occupier of a building and elevator were held not liable to one who was injured by being pushed into and falling down an elevator well, where the opening of it was in a wall of the building and outside the limits of a street, and while the elevator was actually in use, in the absence of proof of negligence in the owner or occupier or that the opening was not so constructed as to be closed by doors or by a proper barrier when the elevator was not being used.¹

The duty of the owner of land near a highway to fence the land for the protection of people using the highway where there is a dangerous place, either on the highway or so near thereto as to be substantially the same thing, is at the root of the obligation to take effectual care that ordinary passengers should not stray at the point of diversion, asserted in *Hurst v. Taylor*,² as incumbent on those who, in the exercise of statutory power, divert a highway. This duty arises probably from the accustomed user of the old way being likely to mislead persons; so that, though there would be no obligation to fence the place if the road were an old way, yet the likelihood of travellers being misled must be the measure by which the question, whether a duty to fence in the changed circumstances is imposed, must be determined. The rule has accordingly been formulated that there is a duty cast upon those who exercise a statutory right to divert a public footpath to take reasonable care to protect passengers who use the new footpath from straying therefrom. Whether in any particular case such care has been used is a question for a jury. This rule is undoubtedly humane and reasonable in itself, but a difficulty arises in the application of it. The power exercised in diverting the footpath is by hypothesis statutory. In the case in question

Duty where highway is diverted.

Hurst v. Taylor.

Difficulty of the decision.

¹ *M'Intire v. Roberts*, 149 Mass. 450, 14 Am. St. R. 432; cp. *Patterson v. Hemenway*, 148 Mass. 94, 12 Am. St. R. 523.

² 14 Q. B. D. 918; *Mayor, &c. of Rotherham v. Fullerton*, 50 L. T. 364, turns on powers given by a local Act to compel owners of land abutting on streets to fence them. The case of *Evans v. Rhymney Local Board*, 4 Times L. R. 72, follows *Hurst v. Taylor*, but is so implicated with its particular facts as not to furnish any authority on a question of principle. One statement as reported—"The decision in *Hurst v. Taylor* clearly shews that there is a duty on the defendants to furnish protection for people using an extremely dangerous place on a dark night"—is either an inaccurate view of *Hurst v. Taylor*, or shews that *Hurst v. Taylor* is inaccurate. See *Hounsell v. Smyth*, 7 C. B. N. S. 731, per Williams, J., at 743.

the work authorized was completed before the accident. If, then, the steps taken follow the statutory power, in the absence of actual negligence, what jurisdiction has a Court to prescribe other precautions than those indicated, or to affect with liability those exercising statutory rights?

Canadian case.
Fall of snow
from roof of
house.

In a Canadian case the action was for injuries sustained by the plaintiff through ice and snow falling from the roof of the defendant's house and injuring the plaintiff while walking on the highway. The evidence was that before the accident happened the defendant, though warned of the dangerous state of the roof, took no measures to remedy it. There was, further, a by-law proved requiring people to keep their roofs clear of snow and ice. A nonsuit granted at the trial was set aside and a new trial directed, on the ground that the facts disclosed evidence for a jury.¹

Attempt to
extend the
liability of an
owner of prop-
erty adjoining
a highway
in Scotland.

In Scotland it was sought, on the authority of a passage in Addison on Torts² and the Scotch case of *Beveridge v. Kinnear*,³ to assert a general obligation on owners of property abutting on a street to keep their property, not merely in such a condition that injury should not result from its natural condition, but also that it should not become dangerous through the intervention of trespassers.⁴ A trespasser on a building yard wishing to open a sliding gate of ordinary construction, the groove of which was somewhat clogged, forced it so that the gate fell into the street and upon a passenger, who sued the owner of the gate for the injury. The Court was of opinion he could not recover, and, though there is some uncertainty in some of the expressions as reported, the general scope of the judgment appears to discriminate between an unsafe condition which is made injurious by a mischievous or thoughtless act, and a condition which is safe as against all usual and ordinary acts, but which may be made unsafe and injurious by wilful trespassers.

Duty where
ownership of
the surface is
separated from
ownership of
the minerals.
In re Williams
v. Groucott.

*In re Williams v. Groucott*⁵ raises a somewhat different point.

¹ *Landreville v. Gouin*, 6 Ont. R. 455, distinguishing *Lazarus v. Toronto*, 19 Upp. Can. Q. B. 9, where there was no notice. See further on this point, *Smethurst v. Proprietors of Independent Church in Barton Square*, 148 Mass. 261, 12 Am. St. R. 550; also *Hannen v. Pence*, 12 Am. St. R. 717. In the Metropolitan area the duty of clearing away snow from the streets is imposed on the sanitary authorities by The Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 31, snow being included under the words street-refuse by sec. 141. The law for the rest of the country, exclusive of London and exclusive of local Acts, is to be found in The Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 43, 44. But see per Lord Esher, M.R., *Graham v. Mayor, &c. of Newcastle* (1893), 1 Q. B. 643, at 646, referring to 5 & 6 Will. IV. c. 50, s. 26.

² (5th ed.) 456.

³ 11 Rettie 387.

⁴ *Murphy v. Smith*, 23 Sc. L. R. 709. See *Bishop v. Durham*, 4 Dunlop 1168; and *Black v. Cadell*, Morison, Dict. of Decisions, 13,905.

⁵ 4 B. & S. 149; distinguished in *Great Laxey Mining Company v. Clague*, 4 App. Cas. 115.

It is whether, when a mine has been severed from the ownership of the surface soil with licence to the owner of the mine to sink a shaft through the surface, it is incumbent on him to protect the owner of the surface against injury to his cattle by reason of the shaft, or whether it rests with the owner of the surface to protect them against it himself. The Court held that this was the duty of the owner of the mine, and that, "when a party alters things from their normal condition so as to render them dangerous to *already acquired* rights, the law casts on him the obligation of fencing the danger, in order that it shall not be injurious to those rights."¹

Willes, J., further held at *Nisi Prius*² that where an excavation is so near a highway as to create or to increase danger to the public, and an accident happens thereby, the person making the excavation is liable, even though a statutory obligation to fence the highway is imposed on other persons who have neglected to do so.

Willes, J.'s,
summing up
in *Wettor v.*
Dunk.

In *In re Williams v. Groucott*³ the law was laid down with reference to an interference with the natural condition of property; the converse case had previously been decided in a group of cases, of which *Fisher v. Prowse and Cooper v. Walker*⁴ may be taken as the chief. The law is clear that, after a highway is dedicated, anything subsequently placed so near the highway as to be a nuisance, or to impair the safe enjoyment of the highway, is as unlawful as if there were an actual obstruction of the highway.⁵ No decision had determined whether an erection or excavation already existing, and not otherwise unlawful, became unlawful when the land on which it existed, or to which it was immediately contiguous, was dedicated to the public as a way, supposing the erection or excavation prevented the way from being as safe and commodious as it otherwise would have been; or whether the dedication must

Fisher v.
Prowse and
Cooper v.
Walker.

¹ Per Blackburn, J., 4 B. & S. 149, at 157. *Sybray v. White*, 1 M. & W. 435, is the only similar case reported. There the law as stated in the text "was taken for granted in the declaration and also by the parties at the trial, as well as afterwards by the counsel in the argument and the Court in giving judgment. It is perfectly true that the point may have passed without consideration, but still the case is so far an authority; and very eminent judges sat in the Exchequer at that time": per Blackburn, J., at 158.

² *Wettor v. Dunk* (1864), 4 F. & F. 298; *Hawken v. Shearer*, 56 L. J. Q. B. 284. The Quarry (Fencing) Act, 1887 (50 & 51 Vict. c. 19), does not extend to Scotland and Ireland.

³ 4 B. & S. 149.

⁴ (1862) 2 B. & S. 770; *M'Fee v. Police Commissioners of Broughty Ferry*, 17 Rettie 765, which holds that there is a duty on police commissioners to take effective measures to prevent the public using a street not safe, would indicate that the law of Scotland differs from the law of England on this point, were it not as inconsistent with *Mackenzie v. Bankes* (1868), 6 Macph. 936, as it is with *Fisher v. Prowse*.

⁵ Thus in *Daniels v. Potter*, 4 C. & P. 262, it was held that the duty of one placing a cellar flap upright against a wall in the public highway during the time the cellar was being lawfully used, was to so secure it that it would not in ordinary circumstances fall on persons using the highway.

Cornwell v.
Metropolitan
Commissioners of
Sewers.

not be taken to be made to the public and accepted by them, subject to the inconvenience or risk arising from the existing state of things. The latter was decided to be the law in *Cooper v. Walker*,¹ a case where stone steps projected into a street to an extent rendering them dangerous to passengers by night. Following the decision of the Exchequer in *Cornwell v. Metropolitan Commissioners of Sewers*,² the Queen's Bench held that the user of the way was taken subject to the risk. In the Exchequer case Alderson, B., said: "Suppose there is an inclosed yard with several dangerous holes in it, and the owner allows the public to go through the yard, does that cast on him any obligation to fill up the holes? Under such circumstances *caveat viator*." And Parke, B., adds: "This is not the case of a new sewer, and therefore we may dispense with the consideration of what the Commissioners are bound to do when they make a sewer. This is an ancient sewer, which has existed with the highway time out of mind, and therefore the public have only a right to the highway subject to the sewer."

Overruling
Coupland v.
Hardingham.

This decision involved overruling the decision of Lord Ellenborough in *Coupland v. Hardingham*,³ which, "being only a holding at *Nisi Prius*, though by a very great judge," "must yield in point of authority to a judgment *in banc*."⁴ Martin, B., conjectured that, "in the case of *Coupland v. Hardingham*, in all probability the road had been used long before the house was built."⁵

Jarvis v.
Dean.

A case of *Jarvis v. Dean*,⁶ not cited in *Cornwell v. Metropolitan Commissioners of Sewers*, was distinguished on the ground that "the report leaves it uncertain whether the area in that case existed before the dedication of the way or not. As it is stated to have belonged to an unfinished house, it probably had not been long in existence, and, as Best, C.J., states in his judgment⁷ that the way had been a public thoroughfare for many years, it seems that the way must have been more ancient than the area, and that the present point could not therefore have been raised. It certainly does not appear to have been raised, and no opinion is given on it."⁸

¹ 2 B. & S. 770.

² 10 Ex. 771.

³ 3 Camp. 398.

⁴ Per Blackburn, J., 2 B. & S. 770, at 782.

⁵ 10 Ex. 771, at 775.

⁶ 3 Bing. 447.

⁷ L. c. at 448.

⁸ 2 B. & S. 770, at 782. In *Morant v. Chamberlain*, 6 H. & N. 541, the point is touched on at 564, and the opinion of the Court there is that a highway may be dedicated to the public subject to a pre-existing right of user by the occupiers of adjoining land for the purpose of depositing goods thereon.

The case of *Firth v. Bowling Iron Company*,¹ so far as it is not determined on its own peculiar facts—the death of an animal caused by swallowing fragments of rusted iron dropping from a fence which the defendants were bound to maintain—seems to point to a principle that, where an obligation exists to fence for the benefit of a neighbour, the fencing must be done in such a way as not to cause injury to the neighbour, not only while the fencing is efficient, but from the natural effects of decay. Such a principle is undoubtedly a sound one.

A practice having grown up of fencing fields adjoining highways with barbed wire, the legality of the practice was questioned in several cases;² and the Barbed Wire Act, 1893,³ was passed, giving the local authority power to serve notice in writing on the occupier of any land adjoining a highway within its district fenced with barbed wire, or in which barbed wire is placed, so as to be a nuisance to such highway, requiring him “to abate such nuisance” within a time to be stated in the notice; and on the expiration of the time stated (which is not to be less than one month and not more than six months), if the occupier has not done so, empowering the local authority to apply to a court of summary jurisdiction, which may direct the occupier to abate such nuisance; and on the occupier failing to comply with an order to do so, may themselves “do whatever may be necessary in execution of the order, and recover in a summary manner the expenses incurred in connection therewith.”

Apart altogether from legislation, if, by any act of an owner of property adjoining the highway, the user of the highway is made less commodious to the public, such owner is liable to indictment. If, too, any private person is injured by a barbed fence while lawfully using a highway, from “making a false step or being affected with sudden giddiness,”⁴ or through the wind blowing his cloak against the barbed wire and tearing it, or through any accident of a similar sort causing him particular damage, he will have his action. No new right is given by the Barbed Wire Act, 1893, but merely a summary and efficient way of vindicating rights as old as the land. A barbed wire fence adjoining a highway is not made a nuisance by the Act. So soon as it becomes a nuisance to the highway it may be dealt with under the Act. But if, through the placing of barbed wire along or against the highway, the person or property of any one lawfully

Firth v. Bowling Iron Company.

The Barbed Wire Act, 1893.

Common law rights of persons using highway.

¹ 3 C. P. D. 254; *Bush v. Brainard*, 1 Cowen (N. Y.) 78.

² *E.g.*, *Stewart v. Wright*, 9 Times L. R. 480; *Elgin County Roads Trustees v. Jones*, 14 Rettie 48.

³ 56 & 57 Vict. c. 32.

⁴ Per Pollock, C.B., *Hardcastle v. South Yorkshire Railway Company*, 4 H. & N. 67, at 74.

using the highway is injured in a way special to himself and not common to all using the highway, then, though no nuisance was before experienced, a right of action will arise for interfering with that full and absolute user of the highway that is the right of every one lawfully using the highway.

*Simkin v.
London and
North-West-
ern Railway
Company.*

In this connection may be noted the case of *Simkin v. London and North-Western Railway Company*.¹ The plaintiffs' horse, drawing a waggonette in which plaintiffs were seated, was frightened by seeing or hearing an engine of the defendants' blowing off steam at a station, where the roadway leading to the station was not fenced or screened from the station. The horse bolted, and the plaintiffs were thrown out of the waggonette and injured. The breach of duty alleged was, "the defendants' line of railway at the station was not properly and sufficiently screened from the roadway forming the approach to the railway." The case manifestly has nothing to do with such a case as *Indermaur v. Dames*,² as the condition of things was perfectly obvious, and has to be considered as the case of property abutting on the highway. If, then, a duty to screen existed, it was a common law duty; since no statutory provision imposing the duty on the railway is even averred. That being so, the assertion of the existence of such a duty would have had very widespreading consequences. For example, practising military signalling would have to be carried on under rigidly restrictive conditions lest the waving of flags should startle horses on the highway. So, too, the working of windmills, and, except in extreme loneliness, games of football and cricket. The Court, however, held there was no such duty; the only duty was "to provide a reasonably safe mode of leaving their station having regard to the business they carried on at their station."

*Fry, L.J.'s,
doubts.*

Fry, L.J., in assenting reluctantly to the decision, states the question as being "whether this danger would have been lessened by placing a screen as suggested," and thus gives an apparent sanction to a mode of estimating liability greatly wider than has usually been accepted. The work of the railway being carried on under statutory authorization, the company were entitled to carry on their business under conditions that would otherwise be a nuisance, if necessary to the adequate conduct of their enterprise.³

¹ 21 Q. B. Div. 453. In *Fullarton v. Manchester South Junction, &c. Railway Company*, 14 C. B. N. S. 54, plaintiff's carriage with others were waiting at a crossing for a train to pass from the station. The engineer, at starting, quite unnecessarily blew off the mudcocks and frightened plaintiff's horse whereby injury was occasioned, for which plaintiff was held entitled to recover. See *Jones v. Grand Trunk Railroad Company*, 16 Ont. App. 37.

² L. R. 2 C. P. 311.

³ *London and Brighton Railway Company v. Truman*, 11 App. Cas. 45.

Neither were they bound to adopt every possible means of obviating danger or inconvenience that ingenuity could suggest or boundless resources supply.¹ There must be a proportion between means and ends. If that be so, the question is not as proposed by Fry, L.J., but, rather, whether the placing of a screen could be regarded as a reasonable precaution for a railway company to take, having reference as well to the outlay necessary, the benefit likely to be derived, the means of the company, and the existing public sentiment on the matter.

In the case before the Court there was some indistinctness in the evidence as to whether it was the sight or the sound that frightened the horse. In the latter event a duty to shut out the sounds of railway operations would impose such an excessively onerous, if not impossible, obligation on a railway company as to come within the principle—that, operations carried on in accordance with statutory authorization, are exonerated from liability for what would be otherwise actionable. It is doubtless possible, by a considerable outlay, to shut out the sight of railway engines from the highway. The question then becomes one of general law: Is there an obligation so to use premises that animals traversing the highway shall not be frightened or offended? Is a hosier to abstain from the display of vermilion-coloured hosiery, a cook-shop proprietor from the emission of steam, a hairdresser from the display of possibly disquieting figures, a lamp vendor from the shew of brilliantly revolving lamps? These and other cases may be put which do not seem at all to differ in principle from what was sought to be established in this case. Fry, L.J., states the case as being that of an “engine which was blowing off steam, and which also presented a hideous and terrifying aspect.” This appalling vision must be tempered by circumstances of time and place. An Indian in full war-paint, plumed, scalp-decked, and armed with the lethal weapons of his tribe, would doubtless be a most disquieting apparition in the streets of a sleepy English country town. Some years ago, at any rate, such a vision in a remote Western settlement would not necessarily have bred much observation. So, too, with a steam-engine and its incidents. To the contemporaries of Oliver Cromwell it would have brought suggestions of the nether world. To the ordinary sane Englishman of to-day it is too familiar to excite more than the most cursory regard. With the change of habits and modes of life comes a change of legal liabilities—especially in such a branch of the law as negligence; what would have been held

¹ *Hanson v. Lancashire and Yorkshire Railway Company*, 20 W. R. 297; *Ford v. London and South-Western Railway Company*, 2 F. & F. 730.

foolhardy a hundred and fifty years ago, to-day is the mere encountering an ordinary risk.

Should an exception to the general rule be made in the case of animals?

If such is the operation of civilization on the relations of human beings, is an exception to be made with regard to the susceptibilities of animals? Setting aside the uncertainty of their dispositions, a plain ground of policy forbids subordinating improvements in the mode of living to the wayward dispositions of animals, whose presence amongst us is regulated by their utility to us. To say that a human being could reasonably be expected to be terrified by the blowing off of steam from a railway engine is absurd; to require a railway company to encounter the large expense of averting the chance glance of a horse from their operations seems scarcely less so, when a comparison is made between the existing risk and the probable benefit resulting from a change. As property adjoining a spot on which the public have a right to carry on traffic is subject to the ordinary exigencies of that traffic,¹ so traffic carried along a spot where the rights of private property are exercised must accommodate itself to the exercise of those rights—where, that is, that exercise does not exceed what is ordinary and accustomed.

Special rights of railway companies.

*Simkin v. London and North-Western Railway Company*² was the case of people—a railway company—carrying on their business with reasonable care and caution. Moreover, the decision involved no more than the assertion of common law rights; for the business the defendants were carrying on, being authorized by the Legislature, could be treated as if in the same situation, and subject, therefore, to the same obligations as any business at common law; for example, that of a smith or a miller. The case of a railway company, however, may be put even higher than this. In *London and Brighton Railway Company v. Truman*³ the Court of Appeal, on the authority of *Managers of the Metropolitan Asylums District v. Hill*,⁴ had, indeed, held that the Legislature cannot be taken to sanction that which is a nuisance at common law, except in the case where it has authorized a certain use of a specific something in a specified position, which cannot be so used without occasioning nuisance; or in the case where it has imperatively directed that something shall be done within a certain area, from the doing of which a nuisance must result. But this decision was reversed in the House of Lords;⁵ and Lord Blackburn stated the correct principle

¹ Per Lord Blackburn, *River Wear Commissioners v. Adamson*, 2 App. Cas. 743, at 769.

² 21 Q. B. Div. 453.

³ 29 Ch. D. 89.

⁴ 6 App. Cas. 193.

⁵ 11 App. Cas. 45, at 60.

as follows: "I think the construction of ordinary Railway Acts is now fixed. And whether they should have originally been construed so or not, I agree with what is said by North, J.:¹ 'Now it is clearly settled that the power to take defined lands compulsorily, and to make a line of railway thereon, and to use locomotives upon that line, entitles a company to run locomotives thereon, notwithstanding that in so doing they cause what, in the absence of such power, would be an actionable nuisance, provided always that they are not guilty of negligence. See *Rex v. Pease*,² *Hammersmith Railway Company v. Brand*.'"³ Thus a railway company can justify under statutory powers.

It has been sought to bring the class of cases, of which *Powell v. Fall*⁴ is a prominent example, within the same principle. But, Locomotive engines on highways. apart from the very material consideration that the decided cases are decided on the Railway Acts and not on the Locomotive Acts, in the latter there is distinct legislative authority that the rule applied in railway cases shall not apply.⁵ An additional element of difference is that a railway engine is used on the company's own land, a locomotive engine on the highway. Admitting, then, that the same law as to nuisance should apply to both, the facts necessary to constitute a nuisance on a highway might be very much slighter than those required to point a nuisance in the user of a man's own property. Again, the emission of steam, the shrieking of whistles, and the noise caused by the moving of trains might very probably appear by no means abnormal in a big manufacturing town when issuing from premises in private ownership, but would considerably alter their complexion if perpetrated on the public highway in a rural or residential district. That being so, the attention of the jury would have to be called to the distinction in obligation on the respective defendants, though the question of nuisance or not nuisance in both cases would be for them.

The law as to locomotive engines on highways is most succinctly laid down by Erle, C.J.,⁶ as follows: "The plaintiff is entitled to your verdict, if the engine was calculated by its noise and appearance to frighten horses, so as to make the use of the highway dangerous to persons riding or driving horses. For the defendant has clearly no right to make a profit at the expense of the security of the public." In *Powell v. Fall*,⁷ where *Watkins v. Reddin*

Erle, C.J.'s, summing up in *Watkins v. Reddin*.

¹ 25 Ch. D. 423, at 431.

² 4 B. & Ad. 30.

³ L. R. 4 H. L. 171. Cp. per Kekewich, J., *Evans v. Manchester, Sheffield, and Lincolnshire Railway Company*, 36 Ch. D. 626, at 634.

⁴ 5 Q. B. Div. 597.

⁵ 24 & 25 Vict. c. 70, s. 13.

Watkins v. Reddin, 2 F. & F. 629, at 634.

⁷ 5 Q. B. Div. 597, at 601.

Bramwell,
L.J., in *Powell*
v. Fall.

does not appear to have been cited, Bramwell, L.J., states the reason of the law in language very similar: "It is just and reasonable that if a person uses a dangerous machine, he should pay for the damage which it occasions; if the reward which he gains for the use of the machine will not pay for the damage, it is mischievous to the public and ought to be suppressed, for the loss ought not to be borne by the community or the injured person. If the use of the machine is profitable, the owner ought to pay compensation for the damage." The inapplicability of reasoning from the railway cases to cases of this class is noted by Lindley, L.J., in *Galer v. Rawson*,¹ where it was "clear to him that there was a great difference between locomotive engines on railways and traction engines on highways. The result of the sections was that any traction engine which was a nuisance and caused damage would give rise to a cause of action even though all the statutory requirements were complied with."

Lindley, L.J.,
in *Galer v.*
Rawson.

On whom the
onus lies of
proving
nuisance.

This was said on the appeal of a case tried before Stephen, J., where the issue was whether the engine which caused the accident sued on was lawfully on the road and properly managed. The jury found this in the affirmative. It was then sought, in the Court of Appeal, to obtain a decision that an engine was in itself a dangerous thing, and any one using it did so at his own risk. The Court refused to rule this as matter of law; and since the point had not been taken at the trial, but the parties had been content to fight on the issue of negligence, they refused to disturb the verdict. The decision, then, comes to no more than the affirmance of the proposition that, where an engine on a road has fulfilled all the statutory requirements, the *onus* is on the persons damnified by injuries caused by it to shew it is a nuisance, and not on the owners of it to prove it is not; or, to state the point somewhat differently, unless evidence is given to shew such an engine is a nuisance, the presumption, in an action against the owner, is that it is not. Apart from cases altogether, the statute seems clear beyond dispute on the point.²

Having considered the duty of the occupiers of property to those using the street, we may, on the other hand, note the duty of the public to those occupying property, abutting on places over which the public have a right of passage.

Lord Black-
burn in *River*
Wear Commis-
sioners v.
Adamson.

Lord Blackburn has on several occasions summed up the leading considerations governing in the law relating to this subject,³ and

¹ 6 Times L. R. 17. (C. A.)

² See 24 & 25 Vict. c. 70, s. 13; and 28 & 29 Vict. c. 83, s. 12.

³ *E.g.*, in *Fletcher v. Rylands*, L. R. 1 Ex 265, at 286; *The Khedive*, 5 App. Cas. 876, at 890; *Cayzer v. Carron Company*, 9 App. Cas. 873, at 882.

nowhere more clearly than in *River Wear Commissioners v. Adamson*,¹ thus: "The common law is, I think, as follows: Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or a navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault and liable to make it good. And he does not establish this against a person merely by showing that he is owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is owner." The reason of this the same learned judge had previously explained, in *Fletcher v. Rylands*,² to be because traffic on a highway—whether by land or sea—"cannot be conducted without exposing those persons or property near it to some sort of risks; and, that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger;" and persons who by the licence of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident."

Reason of
this rule.

II. We are now to ascertain what is the duty of an occupier of property to persons using his property as bare licensees or volunteers.

Duty to meet
licensees.

The first case under this head is *Corby v. Hill*.³ An action was brought against a builder for having negligently placed certain slates on a private road without notice or warning of the obstruction, by reason whereof the plaintiff, who was driving his horse along the road, drove him against the slates, and the horse was injured. The plea was that the obstruction was placed on the ground by licence of the proprietors of the soil. The Court⁴ was of opinion that, "having, so to speak, dedicated the way to such of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent to them to place thereon any obstruction calculated to render the road unsafe and likely to cause injury to those persons to whom they had held it out as a way along which

Corby v. Hill.

¹ 2 App. Cas. 743, at 767.

² L. R. 1 Ex. 265, at 286.

³ 4 C. B. N. S. 556.

⁴ L. c. per Cockburn, C.J., at 563.

they might safely go." Neither could a third person "acquire the right to do so under their licence or permission."

Bolch v. Smith.
Statement of
the law by
Wilde, B.

In the succeeding case of *Bolch v. Smith*,¹ Wilde, B., thus expressed his view of the law: "If A gives B permission to cross his yard, in which there are several ways, and there is a pit in the yard which is usually covered, but on a particular night, it being uncovered, B falls into it, I can understand that A would be liable.² But if the hole has always been uncovered, and B in broad day walks into it, would A be liable?" The facts proved showed that men were employed under condition that they were not to leave their work for the day, and water-closets were built for their use, to reach which they had permission to use certain paths which crossed the dockyard. The defendant had been permitted to build a mortar-mill on the side of one of the paths. The plaintiff had gone along this path to one of the water-closets, and on returning had stumbled, and, in endeavouring to save himself, his left arm had been caught by the shaft, and so injured as to require amputation. There were two other paths to the water-closet, the one the plaintiff used being the most convenient. The Court held he could not recover: and distinguished *Corby v. Hill* on the ground that there the injured man had a *right* to use the road, while in the present case plaintiff had only *permission*, which, said Martin, B., "involves leave and licence, but gives no *right*." "I will add," says Wilde, B.,³ "that I do not mean to say that if the defendant had made a hole in the yard and had covered it in a way that was insufficient, but which appeared to be sufficient, he would not have been liable. But here there was nothing of the character. The danger was open and visible; there was nothing which could be called a trap."

Corby v. Hill
distinguished.

Distinction
considered.

It is questionable whether the distinction drawn between a *right* and a *permission* explains the cases. In *Corby v. Hill* the slates

¹ 7 H. & N. 736, at 742. In *Griffiths v. London and North-Western Railway Company*, 14 L. T. (N.S.) 797, where a "mere licensee" got under a crane from which a package fell and injured him, it was said a railway company must be allowed to carry on their business on their own premises in such a way as they think fit. When the company used this crane it was never thought that any one would go under it; it was merely used in carrying out their own mode of doing their own business; how can it be said that there was any negligence? "The defendants had a right to use the most defective slings they liked as far as the conduct of their own business was concerned, merely compensating the owners of goods for any injury done thereby to such goods." *Harrison v. North-Eastern Railway Company*, 29 L. T. (N.S.) 844, holds there is no duty on a railway company which allows people to cross their line, but in no definite track, to use care to protect them. In *Cawte v. Olyett*, 5 Times L. R. 56 (C. A.), where the hatch of a disused barge was open and plaintiff fell down while crossing the barge to moor his own barge to the same buoy, yet, as the evidence shewed, that the hatch had been properly fastened, and that the bar had been removed without defendant's knowledge, it was held there was no duty on the defendant to afford further protection.

² Cp. *Gavin v. Arrol*, 16 Rettie 509; *Pritchard v. Lang*, 5 Times L. R. 639.

³ 7 H. & N. 736, at 746.

were on the road unknown to the licensee, while in *Bolch v. Smith* the engine was there before the license to use the path had been granted. In the one case, the plaintiff took subject to the right to have the engine there; in the other, the obstruction was an infringement on his right, or at least the placing of a dangerous substance in a place that he was allowed to use without giving him warning of the alteration in the state of things, whereby he might be injuriously affected. In both cases, as long as the tacit permission existed, there was, as against any one except the owner, a *right* to use the paths. In neither case, had the owner taken proper steps to forbid or to limit the user, was there any right as against him. It seems, then, that the ground of the decision in the two cases is that in one a danger had been added without means being taken to communicate the alteration to the plaintiff; in the other, the condition of the way was, or might have been, well known to the plaintiff, and no alteration had been made in it.¹

Cockburn, C.J., points out the distinction between these cases in *Gallagher v. Humphrey*,² where a passage over defendant's premises was used to the knowledge of the defendant by numbers of people, and, amongst them, by the plaintiff. The accident from which the action originated was caused by negligently lowering goods from the warehouse abutting on the way. Cockburn, C.J., says: "A person who merely gives permission to pass and repass along his close is not bound to do more than allow the enjoyment of such permissive right under the circumstances in which the way exists; that he is not bound, for instance, if the way passes along the side of a dangerous ditch or along the edge of a precipice, to fence off the ditch or precipice. The grantee must use the permission as the thing exists. It is a different question, however, where negligence on the part of the person granting the permission is superadded. It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way. The plaintiff took the permission to use the way subject to a certain amount of risk and danger; but the

Cockburn,
C.J.'s, judg-
ment in
Gallagher v.
Humphrey.

¹ The judgment of Bigelow, C.J., in *Sweeny v. Old Colony and Newport Railroad Company*, 92 Mass. 368, well deserves study as a comprehensive statement of the principle of the law on this subject. "The true distinction," the Chief Justice says at 374, "is this: a mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but, if he directly or by implication induces persons to enter or pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby." This distinction, the Chief Justice adds, is the "pivot" on which the cases turn. *Castle v. Parker*, 18 L. T. (N. S.) 367, compared with *Watkins v. Great Western Railway Company*, 46 L. J. C. P. 817.

² 6 L. T. (N. S.) 684.

case assumes a different aspect when the negligence of the defendant—for the negligence of his servants is his—is added to that risk and danger.”

American cases.

The United States cases do not go even this length where the defendant is a railway company. The principle there is that, when a railway company has for years, and without objection, permitted the public to cross its line at a given point, not a public crossing, it owes a duty of reasonable care to those making use of the crossing, and that it is a question for the jury to say whether the duty is discharged.¹

Watson, B., in *Barrett v. Midland Railway Company*.

There is a *nisi prius* ruling of Watson, B., in *Barrett v. Midland Railway Company*,² that may in one view of it be construed to go a similar length. The plaintiff lived in one of a row of cottages facing the defendants' railway lines, and the occupants of the cottages were in the habit of using a defined way across the line with the knowledge of the defendants, but not as a right. Plaintiff sued in respect of injuries received while crossing. Watson, B., directed the jury that “though there was no right of way, still the circumstance of people being in the habit of passing threw upon the company the responsibility of using reasonable care before moving over that portion of their line. If you think there was negligence in the person having the conduct of the engine, or that warning in some way should be given to those crossing the line under circumstances of danger, of which they may not be in a condition to be fully conscious, the defendants will be liable.” It is doubtful if this amounts to more than a direction that the defendants are not allowed to increase the risks of crossing. Because the crossers are bare licensees, the defendants are not entitled to conduct themselves negligently with regard to them. The question of how this “responsibility of using reasonable care” is to be measured, is untouched by the direction. The answer to it is given by Willes, J., in *Gautret v. Egerton*.³

Gautret v. Egerton.

In *Gautret v. Egerton* the declaration attempted to set up a general duty of the defendants to keep their land in safe condition for the benefit of any persons that might go on it, without alleging any benefits that might accrue to the defendants, or that they had been guilty of any wrongful act of commission, or anything that amounted to the laying a trap. Willes, J., in giving judgment, having examined the declaration and shown that it only alleged a permission to use a way, thus dealt with the alleged legal duty:⁴ “A permission to use the way must be taken

Judgment of Willes, J.

¹ *Taylor v. Delaware and Hudson Canal Company*, 113 Pa. St. 162.

² (1858) 1 F. & F. 361.

³ (1866) L. R. 2 C. P. 371; *Keeble v. East and West India Docks*, 5 Times L. R. 312 (C. A.).

⁴ L. R. 2 C. P. 371, at 375.

to be in the character of a gift. The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time, and omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable. It is quite consistent with the declaration in these cases that this land was in the same state at the time of the accident that it was in at the time the permission to use it was originally given. To create a cause of action, something like fraud must be shown. No action will lie against a spiteful man, who, seeing another man running into a position of danger, merely omits to warn him. To bring the case within the category of actionable negligence, some wrongful act must be shewn, or a breach of some positive duty; otherwise, a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the licence. Every man is bound not wilfully to deceive others, or to do any act which may place them in danger."

The law is succinctly summed up by Pigot, C.B., in *Sullivan v. Waters*;¹ "A mere licence given by the owner to enter and use premises which the licensee has full opportunity of inspecting, which contain no concealed cause of mischief, and in which any existing source of danger is apparent, creates no obligation in the owner to guard the licensee against danger."

Summary of
the law by
Pigot, C.B.,
in *Sullivan v.*
Waters.

*Burchell v. Hickisson*² is very like *Gallagher v. Humphrey*. A boy of four years accompanied his sister, who was going on business, to the defendant's house. A flight of steps, protected on either side by railings, led up to the front door. One of the railings was broken, leaving a gap, across which a rope had been placed, but this had worn out and had not been renewed. The sister went up the steps, telling the child to remain below. He disobeyed, and, falling through the opening, was injured. Lindley, J., in giving the judgment of the Court, rested it on the alternative—"The defendant never invited such a person as the

Burchell v.
Hickisson.

¹ 14 Ir. C. L. R. 460, at 475. It had previously been laid down in *Metcalf v. Hetherington*, 11 Ex. 257, that the words "negligently and improperly" and "contrary to their duty" will not dispense with the necessity of setting forth facts that shew the duty. See, too, *General Steam Navigation Company v. Morrison*, 13 C. B. 581; *Dutton v. Powles*, 2 B. & S. 174, at 191; *Seymour v. Maddox*, 16 Q. B. 326; *Robertson v. Adamson*, 24 Dunlop, 1231.

² (1880) 50 L. J. Q. B. 101. In *Murley v. Grove*, 46 J. P. 360, Cave, J., says: "As to the *dictum* in *Gallagher v. Humphrey*, I think, too, that it is doubtful whether even the fact that the injured person was present unlawfully would excuse negligence. I cannot think that Compton, J., can have been correctly reported." Cp. *Bedman v. Tottenham Local Board of Health*, 4 Times L. R. 22. Very like *Burchell v. Hickisson*, is *Cusick v. Adams*, 115 N. Y. 55; 12 Am. St. R. 772. As to allurements to children and the special degree of responsibility attaching, see *ante*, 189.

plaintiff to come unless he was taken care of by being placed in charge of others, and, if he was in charge of others, there was no concealed danger."¹ Had there been an invitation on business—had, for example, the sister fallen through the hole—the obligation on the defendant would have been different, and would probably have been expressed as a duty to maintain the steps in the ordinary condition in which steps for the purpose of approaching a house are ordinarily kept.² In that case, in the words of Byles, J. :³ "The knocker says 'Come and knock me,' the bell says 'Come and ring me,' and he who on proper occasion responds to this invitation, does so with a right to protection."

Ivay v.
Hedges.

The distinction between the two classes of cases is further illustrated in *Ivay v. Hedges*.⁴ Defendant, the landlord of a house, let it out in tenements, each tenant having the privilege of using the roof to dry linen on. The roof was flat, with an iron rail round the edge. This rail was, to the knowledge of the landlord, out of repair. The plaintiff, when going to the roof for the purpose of removing linen, slipped and caught at the rail, which gave way, so that the plaintiff fell into the courtyard below. The county court judge, before whom the case originally came, gave judgment for the defendant, holding that there was no duty on the landlord to protect such a place, and that those using it used it as licensees and not under their contract. In the Divisional Court it was sought unsuccessfully to obtain a new trial on the authority of a Scotch case, *M'Martin v. Hannay*,⁵ where a child was killed by falling through the railing of a common stair, where one of the banisters was wanting. The Scotch case was distinguishable in that there the staircase, through defect in which the accident happened, was a necessary part of the holding, which all the tenants were *entitled* to the use of, and which had to be kept in repair; while in the present case the roof was not a part of the holding, and the tenants were merely at *liberty* to use it as it was, and without obligation on the landlord. The plaintiff in this case and the child in *Burchell v. Hickisson* had precisely similar rights; while the legal rights of the child in *M'Martin v. Hannay* were similar to those of the sister in *Burchell v. Hickisson* had the accident happened to her.

Batchelor v.
Fortescue.

The same absence of a legal duty to take care is the ground

¹ Cp. *Waite v. North-Eastern Railway Company*, E. B. & E. 719.

² *Holmes v. North-Eastern Railway Company*, L. R. 4 Ex. 254, affirmed, "for the reasons given by the Court of Exchequer," L. R. 6 Ex. 123.

³ *Smith v. London and St. Katherine Docks Company*, L. R. 3 C. P. 326, at 331.

⁴ 9 Q. B. D. 80. *McAlpin v. Powell*, 70 Y. Y. 126; cp. *Willoughby v. Horridge*, 12 C. B. 742.

⁵ 10 Macph. 411; cp. *Webster v. Brown*, 19 Rettie 765.

of the decision in *Batchelor v. Fortescue*.¹ The defendant, a contractor, was carrying on his business on his own ground when the deceased husband of the plaintiff (the action was brought under Lord Campbell's Act), who was the watchman of neighbouring property to that where defendant's men were working, came to look on at the progress of the work, and, an accident happening, was killed while there. Doubts were expressed whether the case of the deceased could be put as high even as that of a licensee; even if they could, the deceased must still be taken to have stood where he did, subject to all the risks of his being there. Some of the expressions used in *Batchelor v. Fortescue*, if taken literally, seem to go a very great way—further perhaps than in any other case of the kind; for example, Smith, J., is reported² as saying: "There was no duty cast upon the defendant to take due and reasonable care of him"—the plaintiff; and Brett, M.R.,³ says: "There was no contract between the defendant and the deceased; the defendant did not undertake with the deceased that his servants should not be guilty of negligence; no duty was cast upon the defendant to take care that the deceased should not go to a dangerous place." These expressions might suggest the conclusion that towards a trespasser there is no duty; this we have seen is not so in law and not so in reason.⁴ Where the safety of life or limb is involved, more serious responsibility intervenes than in other cases.⁵ The existence or non-existence of a contract cannot be an wholly adequate measure of the responsibility of one man with reference to the safety of another;⁶ and though "no duty was cast upon the defendants to take care that the deceased should not go to a dangerous place," yet if, in full sight of defendants' servants, he were there, they were in a different position with regard to the continuance of operations known to them to be dangerous than if he were not there. As Lord Esher, M.R., says in *Le Lievre v. Gould*:⁷ "If a man is driving on Salisbury Plain, and no other person is near him, he is at liberty to drive as fast and as recklessly as he pleases. But if he sees another carriage coming near to him, immediately a duty arises not to drive in such a way as is likely to cause an

Wide expressions used in the judgments.

Commented on.

Lord Esher, M.R., in *Le Lievre v. Gould*.

¹ 11 Q. B. Div. 474. *Smith v. Highland Railway Company*, 16 Rettie 57, where a child was killed on a private line of railway leading to a harbour, illustrates the same principle; *Castle v. Parker*, 18 L. T. (N. S.) 367; cp. *Thatcher v. the Great Western Railway Company*, 10 Times L. R. 13 (C. A.).

² 11 Q. B. Div. at 477.

³ 11 Q. B. Div. at 479.

⁴ *Bird v. Holbrook*, 4 Bing. 628.

⁵ *Ante*, 177. *Collett v. London and North-Western Railway Company*, 16 Q. B. 984; *Indianapolis, &c. Railroad Company v. Horst*, U.S. 93 (3 Otto) 291.

⁶ *Foulkes v. Metropolitan District Railway Company*, 5 C. P. Div. 157.

⁷ (1893) 1 Q. B. 491, at 497.

injury to that other carriage." The same is true if a man is driving in his own park and he sees a trespasser in front of him. He may not in law, any more than in morals, drive over him. An inquiry of Bowen, L.J.'s, in the course of the argument—"what evidence is there that the defendant had reason to suppose that the deceased would be at the spot where he met his death"—very probably affords the key to the decision. Not only, as stated by Brett, M.R., in the judgment, was there no "reason to expect the deceased to be at the spot where he met with his death;" but there was no evidence to show he was there such a time as to enable the defendant's servants to warn him of his danger, or to cause the duty to do so to arise.

Tolhausen v.
Davis.

Tolhausen v. Davis¹ illustrates the same principle as Batchelor v. Fortescue—that, because the defendant was not shown to have had any reason to suppose the injured person would be where she was when injured, there was no duty to take precautions against her being injured.

United States
cases.

In two United States cases² the duty to use ordinary care to a trespasser is asserted; and this duty is described by the Supreme Court of the United States as one that "cannot be doubted."³

Rights of
travellers.

Travellers on a street have not only the right to pass, but to stop and rest on necessary and reasonable occasions, that is, provided they do not obstruct the street or doorways, or wantonly injure them. In a Maryland case⁴ a foot passenger on a city street, sat for a moment on the door sill of a house fronting on the street to tie his shoe, and while there, was injured by a brick

¹ 58 L. J. Q. B. 98; Crawford v. Upper, 16 Ont. App. 440. Tolhausen v. Davis is discussed in the *Law Times* newspaper, 25th February 1888. The American cases are collected in a note to Donaldson v. Wilson, 1 Am. St. R. 487, at 489. Walker v. Midland Railway Company, 2 Times L. R. 450 (H. L.), was a case where a man mistook the door of a service-room for that of a water-closet, and, entering, fell down the well of a lift and was killed. It was held in the House of Lords that there was no duty on the defendants, "for the service-room was a place in which no guest of the hotel had any right or legitimate occasion to be, and into which no guest was expressly or impliedly invited to go." "I think it," said Lord Selborne, "impossible to hold that the general duty of an innkeeper to take proper care for the safety of his guests extends to every room in his house, at all hours of night or day, irrespective of the question whether any such guests may have a right or some reasonable cause to be there; the duty must, I think, be limited to those places into which guests may reasonably be supposed to be likely to go in the belief, reasonably entertained, that they are entitled or invited to do so." See The Apollo (1891), App. Cas. 499. As to "due diligence," see per North, J., Colley v. Hart, 44 Ch. D. 179, at 184; in The Queen v. Commissioners for Special Purposes of the Income Tax, 20 Q. B. D. 549, 21 Q. B. Div. 313, it is held that under 5 & 6 Vict. c. 35, s. 133, over-assessment of income-tax must be found and proved as soon after the end of the year for which it is assessed as the applicant can ascertain it, "by using all reasonable and proper exertions." This may serve as a species of translation of "due diligence."

² Bains v. Railroad Company, 42 Vt. 380; Rounds v. Delaware, &c. Railroad Company, 64 N. Y. 129.

³ Grand Trunk Railroad Company v. Richardson, 91 U.S. (1 Otto), 454, at 471.

⁴ Murray v. M'Shane, 52 Md. 217, 36 Am. R. 367.

falling from the dilapidated wall of the house upon his head, which was within the street line. The Court held the owner of the house liable, adding: "A ruined and dilapidated wall is as much a nuisance if it imperils the safety of passengers or travellers on a public highway as a ditch or pitfall does by its side."

The circumstances of tenement houses suggest the consideration of the duty to maintain the common staircases and passages. The ordinary relation between landlord and tenant does not satisfy the requirements of this case, for there the tenant has full control, here only user with others. The possession and control is in the landlord, who prefers "to make one passage way for all rather than one for each." He holds out an inducement to all who need such accommodation to come and pass over this passage, which is a way provided in the same sense as a man provides a way for his customers to his place of business. This being so, "the same implied covenant to keep in safe and convenient repair must exist as much in one case as in the other," and the use of the hall and staircase, for the purpose of enjoying visits, is by necessary implication within the reasonable intent of the demise of the rooms.¹

Special features of tenement houses.

This was held good law in England by the Court of Appeal in *Miller v. Hancock*,² where the landlord's liability to repair was denied on the ground that the owner of the dominant tenement (so the tenant was called) must do such repairs as may be necessary for the enjoyment of his easement.³ Bowen, L.J., met this by citing Lord Mansfield's *dictum* in *Taylor v. Whitehead*,⁴ that "by the common law he who has the use of a thing, ought to repair it, but the grantor may bind himself." The Court were of opinion that in the case of tenement houses, there is by necessary implication an agreement by the landlord with his tenants binding him to keep the staircase in repair, since he knows that persons who have business with the tenant will be coming up and down the stairs in ordinary course; and that being so, on the analogy of *Smith v. London and St. Katharine Docks Company*⁵ a

Miller v. Hancock.

¹ *Sawyer v. McGillicuddy*, 10 Am. St. R. 260. In *M'Martin v. Hannay*, 10 Macph. 411, where a child was killed by falling through the railing of a common stair where one of the banisters was wanting, the proprietor was held liable on the ground that notice of the defect was brought home to his factor.

² (1893) 2 Q. B. 177; *Henkel v. Muir*, 31 Hun. (N.Y.) 28, where the landlord's liability is said to rest wholly upon actual negligence, in which the duty or obligation of the landlord is only an element. "In addition to that element it must appear that with some notice of the condition of things, or under some circumstances equivalent to notice such as an unreasonable omission to ascertain the condition, he had failed to make the necessary repairs or changes called for by the condition or exigency."

³ *Pomfret v. Ricroft*, 1 Wms. Saund. 321.

⁴ 2 Doug. 745.

⁵ L. R. 3 C. P. 326.

duty arises on the landlord's part towards persons using the staircase on business with the tenants. Kay, L.J., adds: "It may be that in order to preserve such an easement (*i.e.*, the right to use the staircase), as between himself and the landlord, the tenant might have a right to repair the staircase"; but, notwithstanding this, the liability to do so is on the landlord, both as against his tenants, and against persons using it on business with them.

III. Persons going upon premises by invitation express or applied.

Southcote v. Stanley.

III. Where the persons using premises go upon business which concerns the occupier, and upon his invitation, express or implied.

In *Southcote v. Stanley*¹ the position of a visitor to premises was considered. Defendant was an hotel-keeper, and was visited by the plaintiff, who, in leaving, opened a glass door, from which a piece of glass fell and cut him; in respect of which injury he brought his action. Defendant demurred; and his demurrer was allowed by the Chief Baron, on the ground that it followed from *Priestly v. Fowler*² that there could be no right of action; for not only do the servants in a domestic establishment undertake to run all the ordinary risks of service, but all the members of the establishment are included, and a visitor is in the same position while he remains as any other member of the establishment; Bramwell, B., concurred, considering that no act of *commission* had been alleged.

Considered.

The case is to be supported by the considerations that apply to the class we have just been dealing with. The visitor comes on the premises, and must take them as he finds them, provided only that there is no concealed danger known to the occupier against which he is not forewarned; that is, the case is not strictly referable to the rules applicable where persons go upon premises upon business; but though, as a matter of fact, a visitor goes to a house on an invitation, express or implied, his rights, while paying his visit, differ nothing from those of the first class we have considered—that of bare licensees. Had the declaration stated that the plaintiff was a guest and not a mere visitor, there would have been a difference, as is pointed out by Erle, J., in *Chapman v. Rothwell*:³ "The distinction is between the case of

Erle, J.'s, comment in *Chapman v. Rothwell*.

¹ (1856) 1 H. & N. 247. In *Collis v. Selden*, L. R. 3 C. P. 495, the declaration stated that the defendant negligently hung a chandelier in a public-house, which fell on the plaintiff. This was held not to disclose a duty, "for it is not shewn in what capacity the plaintiff was there; it is merely alleged he was lawfully there." *Converse v. Walker*, 30 Hun. (N.Y.) 596, is said in the judgment, at 602, where the law is carefully considered, to be "not unlike *Southcote v. Stanley*." *Cp. King v. Great Western Railway Company*, 24 L. T. (N.S.) 583.

² 3 M. & W. 1.

³ E. B. & E. 168.

a visitor (as the plaintiff was in *Southcote v. Stanley*), who must take care of himself, and a customer, who, as one of the public, is invited for the purposes of business carried on by the defendant." Had the plaintiff been a guest using the hotel, the defendant's obligation would have been greater. He would have been bound to know that things like the window will ultimately get out of order, and there is a duty from time to time cast upon him to turn his attention to them. If he could shew that he did investigate, and there was some latent defect which he could not discover, he would discharge the duty on him; if he did not discover what he ought on investigation to have discovered, then he would be liable for the consequences.¹

There is at first sight some difficulty in reconciling the apparent decision of the Court of Common Pleas in *Axford v. Prior*² with *Southcote v. Stanley*³ and *Collis v. Selden*.⁴ Plaintiff entered defendant's inn without speaking to any one, and not for the purpose of ordering refreshments, but to wait for a friend who had not arrived. Part of the floor of the parlour of the house had been taken up, leaving a hole about four feet square, and the carpenter was still at work upon it. The plaintiff walked into the parlour, and fell into the hole, which he swore he did not see. At the trial, before Byles, J., and a jury, the plaintiff got a verdict, with £30 damages. The Court refused a rule, saying there was no ground for a non-suit, and that, as the judge, who tried the case, was not dissatisfied with the verdict, they would not be justified in interfering with it. The declaration, however, averred that the plaintiff was "lawfully in the said inn as a guest," and the decision of the Court was probably no more than that it was matter for the jury to say in what capacity the plaintiff was on the defendant's premises, and that they could not disturb the verdict of the jury when the declaration alleged a cause of action, and the judge at the trial was not dissatisfied with the finding of the jury.⁵ In *Southcote v. Stanley* the declaration alleged that defendant "invited the plaintiff to come as a visitor," thus shewing no cause of action on the face of it; while in *Collis v. Selden* there was no statement whatever in the declaration beyond the general allegation that the plaintiff was on the premises at the time of the accident.

The judgment in *Southcote v. Stanley* goes no further, then, than its direct decision as to the position of a visitor.⁶ Before

Axford v. Prior: the case of "a guest" and not of "a visitor."

Resorting to premises on business purposes.

¹ *Tarry v. Ashton*, 1 Q. B. D. 314, at 319. ² 14 W. R. 611. ³ 1 H. & N. 247.

⁴ L. R. 3 C. P. 495.

⁵ *Cp. Sandys v. Florence*, 47 L. J. C. P. 598.

⁶ This is manifest from *Sandys v. Florence*; 47 L. J. C. P. 598, where the claim was against an hotel-keeper for injuries caused by the fall of a ceiling in a room of the hotel while plaintiff "was using the said hotel as a guest for reward to the defendant."

Parnaby v.
Lancaster
Canal Com-
pany.

that decision—indeed, as early as the year 1839, in the well-known case of *Parnaby v. Lancaster Canal Company*¹—the liabilities attaching to carrying on business, and the consequent invitation to the public to resort to the premises where business was carried on, were considered in the Queen's Bench, and on appeal in the Exchequer Chamber. The company had a canal, and took tolls on it. A boat having sunk in the canal, the difficulties of avoiding it were very great. By the company's Act it was *lawful* for the company, in the case of a boat sinking in the canal, to weigh it up, and retain it for expenses, but the company did not act upon their powers; by reason of leaving the sunk boat in the canal Parnaby's boat navigating the canal ran foul of it, and was injured.

Lord Den-
man, C.J.

Both Courts held that though the exercise of the statutory power conferred on the canal company was permissive, yet the company were liable on a common law principle that the owners of a canal taking tolls for the navigation are bound to use reasonable care in making the navigation secure. Lord Denman said:²

Tindal, C.J.,
in the Ex-
chequer
Chamber.

"It is the same, in principle, as if they announced the carrying on of a business at premises accessible only by a certain road over their land, which was open to the public for that purpose, but which they only, and not the public, had a right to repair, and they left that road in so bad a state that a person's leg was broken when he came to transact business with them there. A more familiar example, and not of very rare occurrence, is that of a shopkeeper who leaves a trap-door open in his shop, and causes a customer to fall down and suffer injury." Tindal, C.J., said:³ "We concur with the Court of Queen's Bench in thinking that a duty of this nature (*i.e.*, to take reasonable care, so long as they keep the canal open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property) is imposed upon the company, and that they are responsible for the breach of it upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable for neglect on leaving a trap-door open without any protection, by which his customers suffer injury."⁴

Chapman v.
Rothwell and
Wilkinson v.
Fairrie com-
pared.

The comparison of *Chapman v. Rothwell*⁵ with *Wilkinson v.*

¹ 11 A. & E. 223.

² *L. c.*, at 230.

³ *L. c.*, at 243.

⁴ In *Monaghan v. Buchanan*, 23 Sc. L. R. 580, the bow rope, by which a steamer was secured to the pier, was let go before the gangway for passengers to pass on the boat was removed, and plaintiff was thrown off and injured. Held, that "the safe practice to see the gangway withdrawn before the bow rope is thrown off, and the tide forces the boat's head away from the pier," should have been adopted; and the plaintiff recovered. Cp. *John v. Bacon*, L. R. 5 C. P. 437; *Timbrell v. Waterhouse*, 6 N. S. W. R. (Law) 77.

⁵ (1858) E. B. & E. 168; *Hasson v. Wood*, 22 Ont. R. 66.

Fairrie,¹ will enable us to distinguish the risks against which it is imperative for the occupier to take heed, from those which the invitee must guard against. In the former case, a trap-door in the floor of a passage, along which the wife of the plaintiff was passing as a customer, was left open, not properly guarded and lighted, whereby she fell down and was killed. In the latter, the plaintiff, going along a dark passage, on business, fell down a staircase. In the one case, the plaintiff was held entitled, in the other disentitled, to recover. The ground of the distinction is reasonable and obvious; since ordinary accidents, such as falling down stairs, are to be imputed to the carelessness or misfortune of the sufferer, while accidents from unusual covert danger, such as that of falling into a pit, are rather referable to the neglect to give adequate warning of their existence.²

The leading case, however, on this branch of the law is *Indermaur v. Dames*.³ Defendant was a sugar refiner, at whose place of business there was a shaft, necessary, usual, and proper for the purposes of the defendant's business. When it was in use it was sometimes necessary, for purposes of ventilation, that it should be open. It was not necessary that it should be unfenced when not in use; and it might, then, without injury to the business, have been fenced. The plaintiff was on the premises testing a gas regulator supplied by his employer to the defendant, and, without negligence on his part, fell down the shaft.

"The common case," says Willes, J.,⁴ "is that of a customer in a shop; but it is obvious that this is only one of a class; for whether the customer is actually chaffering at the time or actually buys or not, he is, according to an undoubted course of authority

¹ (1862) 1 H. & C. 633.

² *Wilkinson v. Fairrie* was distinguished in *Paddock v. North-Eastern Railway Company*, 18 L. T. (N. S.) 60, on the ground that the plaintiff chose to go wandering about in the dark looking for what he wanted, and was to all intents a volunteer. In *Nicholson v. Lancashire and Yorkshire Railway Company*, 34 L. J. Ex. 84, a passenger fell over a hamper taken out of the train and placed at the side of the line some distance from the platform, but where there was an usage for passengers to pass in going out of the station; it was held there was some evidence of a duty on the part of the company. Cp. *Holmes v. North-Eastern Railway Company*, L. R. 4 Ex. 254 in Ex. Ch. L. R. 6 Ex. 123. See *Cornman v. Eastern Counties Railway Company*, 4 H. & N. 781; *Sturges v. Great Western Railway Company*, 8 Times L. R. 231 (C.A.); *Jones v. Grand Trunk Railroad Company*, 16 Ont. App. 37.

³ (1866) L. R. 1 C. P. 274, in the Ex. Ch. L. R. 2 C. P. 311. In *Butts v. Goddard* 4 Times L. R. 193, plaintiff recovered where, calling upon auctioneers and estate agents, she entered by a door, which was not the usual entrance, and, having reached a folding door, which she pushed open, fell down a flight of steps leading to a cellar. In *Mason v. Langford*, 4 Times L. R. 407, plaintiff was held disentitled where she went to defendant's shop when the shutters were down, but the door was ajar, which she pushed open and stepped in down a steep flight of steps, the trap-door of which was raised. See, too, *Steer v. St. James's Residential Chambers Company*, 3 Times L. R. 500; *O'Neil v. Everest*, 61 L. J. Q. B. 453, considered *ante*, 73. The law in the United States is identical with our own. See *Bennett v. Railroad Company*, 102 U.S. (12 Otto) 577, where the English cases are reviewed at 581.

⁴ L. R. 1 C. P. at 287.

and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trap-door left open unfenced and unlighted." "The class to which the customer belongs include persons who go, not as mere volunteers or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, expressed or implied. And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

Precautions
that should
be adopted.
Crafter v.
Metropolitan
Railway
Company.

Duty inde-
pendent of
privity.

Smith v.
London and
St. Katharine
Docks Com-
pany.

In determining what precautions ought to be adopted in individual cases practical difficulties will often arise; the discriminating line, however, is indicated in *Crafter v. Metropolitan Railway Company*,¹ "between suggestions of possible precautions and evidence of actual negligence such as ought reasonably and properly to be left to a jury."

In *Smith v. London and St. Katharine Docks Company*² the duty of the occupier is held to exist independent of privity. The company there were the owners of docks, who provided access by means of gangways to the vessels in their docks. The plaintiff, going on a vessel for business, saw the gangway, and, proceeding upon it, fell into the water. The defendants were held liable, "for the gangway being placed there as the means of access to all persons having business on board the ship, it amounts to an invitation to persons having business on board the ship to go upon it." The rule, then, may be thus stated, that persons inviting others not only on their own premises, but upon any premises, are answerable for anything in the nature of a trap existing in the means they afford for going upon such premises.³ The test of an act done for the common interest of the

Test to distin-
guish between
licensees.

¹ L. R. 1 C. P. 300, per Montague Smith, J., at 304; *Longmore v. Great Western Railway Company*, 19 C. B. N. S. 183; *Great Western Railway Company v. Davies*, 39 L. T. (N.S.) 475.

² L. R. 3 C. P. 326, per Bovill, C. J., at 332.

³ In *Watkins v. Great Western Railway Company*, 46 L. J. C. P. 817, Denman, J., held that a passenger's friend is not in the position of a person barely licensed, but when seeing his friend off is "on lawful business in which the passenger and the company have both an interest"; and in *Thatcher v. the Great Western Railway Company*, 10 Times L. R. 13, Lord Esher, M.R., said: "If a person was on the premises of another with that other's consent, the latter had a duty to take reasonable care not to act in such a way as to cause personal injury to the former."

parties was subsequently, in *Holmes v. North-Eastern Railway Company*,¹ used to discriminate the position of a licensee from that of a person on premises to whom a duty to take care is owing. "As soon as you introduce the element of business, which has its exigencies and its necessities, all idea of mere voluntariness vanishes."²

In *Lax v. Corporation of Darlington*,³ Bramwell, L.J., thus expressed the duty owing in the second class above mentioned: "If the place was not safe, if there was danger that was not obvious to any person coming there, that person ought to have been warned against it, and it should have been said: 'If you come, you must come and take the place as you find it, for the situation of things is such that there is danger there.' The defendants did not warn the plaintiffs, and the jury have found that the place was dangerous, and, therefore, there is, in my opinion, a *prima facie* case against them, not upon any ground of negligence or misfeasance, but simply upon this ground that they have not done their duty to their customer in apprising him that there was danger in his accepting their invitation and allowing him to come on their ground for a profit to themselves." The case raised the question of the liability of the lord of a market for the death of a cow injured by jumping a dangerous railing in a market place. Brett, L.J., summarizes the judgment of the Court as follows: "I am of opinion that the defendants were under the liability—*prima facie* at all events—of affording a reasonably safe place for the standing of cattle. The finding of the jury is that they did not do so; therefore, in my opinion, the defendants are liable."⁴

Lax v. Corporation of Darlington.
View of Bramwell, L.J., as to duty.

*White v. France*⁵ raised for decision, not what the duty to a person invited on premises is—for that was made clear by the earlier cases—but what circumstances outside express invitation will confer upon a person the rights of a licensee. A licensed waterman out of employment saw that defendant's barge was in charge of one man only, and not of two, as required by the rules of the Thames Conservancy Board. Accordingly, he went on the defendant's premises to point out the omission, and to get

White v. France.

¹ L. R. 4 Ex. 254, in Ex. Ch. L. R. 6 Ex. 123. In the Court of Exchequer Channell, B., says at 258: "In one sense the plaintiff was a licensee, but he was not a *mere* licensee, and the word *mere* has a very qualifying operation."

² L. R. 4 Ex. 254, per Cleasby, B., at 259.

³ 5 Ex. Div. 28, at 34.

⁴ *L.c.*, at 33. Cp. *Clayards v. Dethick*, 12 Q. B. 439: also *Pittsburgh Southern Railway Company v. Taylor*, 104 Pa. St. 306, where the Supreme Court of Pennsylvania, Paxson, J., delivering the judgment, took a view similar to that of Bramwell, L.J. The Court of Maine decided the same way, in *Merrill v. Inhabitants of North Yarmouth*, 78 Me. 200, where a man unnecessarily drove his waggon across a flooded highway. The other side of the question is considered in *City of Altoona v. Lutz*, 114 Pa. St. 238.

⁵ 2 C. P. D. 308.

Scotch case:
Brady v.
Parker.

employment. He was referred to the foreman, who he was told would be on the premises the next day. Returning the next day he was injured by the fall of a bale of goods from a warehouse trap-door. The Court held that he was on the premises "on lawful business in which both the plaintiff and the defendant had an interest," and so could recover. A similar decision was given in a Scotch case, where a dealer in firewood visited premises on a dark evening for the purpose of buying tar-barrels for firewood, and was referred by one of the workmen to a clerk, who told him that they did not sell them; on his way off the premises he fell down an open hatchway and was killed.¹

Nicolson v.
Macandrew.

Nicolson v. Macandrew,² another Scotch case, is governed by different considerations. There pursuer, a mason, had lent a shovel to a fellow-workman, and, wishing to reclaim it, climbed a ladder and passed along a scaffold erected, not for masons, but for joiners. It was not alleged that other workmen than the joiners were in the habit of using the scaffolding with the permission of the defenders, or that they had occasion to use it. Through the defect of the scaffold the pursuer was injured. "I do not see," said the Lord President (Inglis), "that there can be any common law liability, the scaffolding not having been erected for the use of the masons." If this view of the facts is right, the difference between the two cases is that between a licensee and a trespasser. In the former case the dealer visited the premises on a purpose common to himself and the owner of them. In the latter the mason's user was without reference to the owner of the premises, and purely for his own convenience.

O'Neill v.
Everest.

In O'Neill v. Everest³ the decision was in favour of the defendant on special facts. Defendant, a master lighterman, contracted to convey goods to a ship, and supplied a barge for the purpose. He contracted with another person to take his barge to the ship and return it when unloaded. Plaintiff was employed by a stevedore to unload the barge. In the course of unloading and after dark he fell through the hatchway of the cabin, for which the defendant had not supplied a cover, and was injured. It was held that the defendant was not liable, as it was no part of his duty to supply a cover for the hatchway.

Mansfield v.
Baddeley.

The case of Mansfield v. Baddeley⁴ is one very close to the line. Plaintiff was employed by the defendant as a dressmaker. It was no part of her duty to go down into the kitchen, but on one occasion she went there, at the request of the defendant, to

¹ Brady v. Parker, 14 Rettie 783.

² (1888) 15 Rettie 854.

³ 61 L. J. Q. B. 453. See ante, 73.

⁴ 34 L. T. (N. S.) 696.

fetch something up. As she was leaving the kitchen, a savage dog, which was generally tied up, rushed from under the table and bit her leg. Plaintiff was aware that a dog of this kind was kept on the premises. The county court judge nonsuited, on the ground that the plaintiff was a servant and knew the disposition of the dog. The Court held the non-suit wrong, as the risk "was not incidental to the service."

If the plaintiff sustained the injury as a servant, it was Considered undisputed that she knew of all the surroundings; there was no concealed danger, and no circumstances known, or that ought to have been known, to the defendant of which the plaintiff was ignorant; while, if she did not sustain the injury as a servant, the question of whether the risk was incidental or not could not arise.¹ Cleasby, B., lays stress on the "fact that the dog was generally tied up"—i.e., that the dog was sometimes loose, but more often tied up; still, the dog could not always be tied up, and, being savage, certainly could not be let run in the street; it, therefore, must of necessity sometimes be loose on the premises. That the dog was generally tied up also seems greatly to have weighed with Grove, J., who, however, considered that the going down to the kitchen was a "mere good-natured act," and "something *ultra* her service." The duty of the occupier of the premises is, then, to protect the invitee from all unusual risks;² yet, from the undisputed facts, it is evident that the plaintiff knew of the existence of the dog and the savageness of its disposition. The possibility of the dog's being loose could not be called an unusual risk, for it was distinctly alleged that the plaintiff had knowledge of what the practice with regard to it was, viz., that it was generally tied up. The law applicable is thus stated by Bowen, L.J., in *Thomas v. Quartermaine*:³ "Where the danger is one incident to a perfectly lawful use of his own premises neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all." On the principle of the decision of *Mansfield v. Baddeley* it is difficult to avoid a conclusion that the owner of a dog known to bite is liable to the same extent to the members of his household, who have full knowledge of the dog's disposition,

Bowen, L.J.,
in *Thomas v.*
Quartermaine.

¹ But *quære*, must not the plaintiff be held to take not merely the risks incidental to the service "but all the *known* risks" on the defendant's premises: *Brooks v. Courtney*, 20 L. T. (N. S.) 440.

² *Chapman v. Rothwell*, E. B. & E. 168; *Wilkinson v. Fairrie*, 1 H. & C. 633; *Smith v. London and St. Katharine Docks Company*, L. R. 3 Q. B. 326.

³ 18 Q. B. D. 685, at 697.

Smillie v. Boyd
distinguish-
able.

as to the world at large; or the alternative conclusion, that a dog known to bite must at all times and in all circumstances be confined, on penalty of inflicting liability on his owner. The case is not the same as *Smillie v. Boyd*,¹ where the dog was habitually shut up while the pursuer was on the premises, whither she went by the permission and on the invitation of the defender's wife. On the day of the accident the dog was let out before the pursuer had left the premises, and bit her. The only point was whether the pursuer's licence had terminated before she was bitten, or the dog had been released while her licence was yet unexpired. The latter having been found as a question of fact, the liability of the defender followed.

Woodley v.
Metropolitan
District Rail-
way Company.
Facts.

A great diversity of opinion was caused by the case of *Woodley v. Metropolitan District Railway Company*,² on the following facts: The plaintiff was a workman in the employ of a contractor engaged by the defendants to execute certain work on a side wall on their line of railway in a dark tunnel. Trains were passing the spot every ten minutes, and the line, being there on a curve, the workmen would not be aware of the approach of a train till it was within twenty or thirty yards of them. The space between the rail and the wall, on which the workmen had to stand while at work, was just sufficient to enable them to keep clear of a train when sensible of its approach. The place in question was wholly without light. No one was stationed to give notice of an approaching train. The speed of the trains was not slackened when arriving near where the men were at work, nor was any signal given by sounding the steam whistle. The service on which the plaintiff was employed was one of extreme danger; and, while he was reaching across the rail to find a tool he had laid down, a train came upon him suddenly, and struck and seriously injured him. On a previous occasion, when similar work was being done, a look-out man had been stationed to give warning to approaching trains, but this precaution had been discontinued.³

The case in
the Exchequer
Division.

In the Exchequer Division, Kelly, C.B., and Amphlett, B.,

¹ 24 Sc. L. R. 148. The business which will ordinarily justify an entry on premises in the absence of an express invitation or an engagement for services must be the ordinary business of the occupant, not that of the plaintiff (for exceptions to this see *Bac. Abr. Trespass, F.*), *Bigelow, L. C. on Torts*, 705.

² (1887) 2 Ex. Div. 384. Cp. *Robertson v. Adamson*, 24 Dunlop 1231, an accident arising from a man, who had been employed on works twenty years, falling from a bridge within the works, which was unprotected by any kind of parapet, and was accustomed to be unlighted, although there was a lamp; also *Clark's Administrator v. Richmond and Danville Railroad Company*, 49 Am. R. 394, where a railway brakesman was killed by collision with a low bridge while standing on the top of a car at night. Cp. *Casey v. Sinclair*, 23 Sc. L. R. 305; also *Huff v. Austin*, 15 Am. St. R. 613.

³ From the judgment of Cockburn, C.J., Ex. Div. at 388, it appeared that the plaintiff had been working for a fortnight before the accident happened.

gave judgment¹ for the plaintiff, on the ground that a look-out man had formerly been employed to warn the workmen of their danger, and that after the accident a look-out man was again employed, so that the jury might hence reasonably infer negligence. Cleasby, B., felt a great deal of difficulty in the case, for that the plaintiff appeared to have exposed himself voluntarily to a known danger; the danger being that he was to work in a tunnel near to a curve where the trains are passing every six minutes,² and therefore the risk which he appeared to take on himself was not always being prepared to get out of the way as each train came. On appeal, the judgment of the Court of Exchequer was reversed by Cockburn, C.J., Mellor and Grove, JJ., Mellish and Baggallay, L.JJ., dissenting.

The point raised was whether, on the facts as stated, there was evidence of negligence. Cockburn, C.J., considered that the plaintiff was working either as a servant of the company; or was on their premises, not only on lawful business, but by their invitation. If the former, he must be taken to have been aware of the nature and character of the work and its attendant risks when he entered upon it. If the latter, he had full notice of the risks, and yet chose to remain. Mellor and Grove, JJ., considered that there was no implied obligation on the part of the company to provide a look-out man, as suggested by the Lord Chief Baron; that, as there was nothing done or omitted by the company in the working of the line that varied from the ordinary way, if the plaintiff thought there was danger of an unusual character in the nature of the work, he was free to have stipulated for precautions or to have left the work altogether; and that, as neither mismanagement nor misconduct ensued, but the business was conducted in the usual way, with equal means of knowledge on all sides, the plaintiff could not recover.

Baggallay, L. J., dissented on the ground that the plaintiff was the servant of the contractor, and that the case could not be distinguished from *Indermaur v. Dames*; also that "the real question was whether the company's train was run in such manner and with such precautions that the plaintiff was not exposed to any undue risk; and this was essentially a question for the jury." Mellish, L.J., also dissented, as he considered that railway companies are bound to take reasonable care that the servants of contractors are not injured by passing trains, and that the fact of the plaintiff having worked in the tunnel for a fortnight without making any objection, and without abandoning his service, was not sufficient

The case before the Court of Appeal. Cockburn, C.J.'s, view.

Mellor and Grove, JJ.'s, view.

Dissent of Baggallay and Mellish, L.JJ.

¹ 2 Ex. D. 384, at 385 n.

² According to Cockburn, C.J., every ten minutes. See 2 Ex. Div. at 387.

to raise a necessary inference in point of law that he consented to their running their trains as usual.

The case
considered.

The judgments of the majority in the Court below and of the dissentient judges in the Court of Appeal proceed on quite different lines; and it is necessary carefully to examine them in order exactly to appreciate the decision. Kelly, C.B., and Amphlett, B., considered the previous and subsequent employment of a look-out man sufficient to raise that amount of evidence which it is necessary to submit to a jury. The Lord Chief Baron is careful not to lay down that there is any duty on the railway company to provide a look-out man: he says merely that, in this case, there having been a look-out man employed, a jury were justified in inferring that his retention was an element in the employment. Mellish, L.J., indeed says that in the Court below it seems to have been taken for granted that railway companies were under an obligation to take reasonable care that the servants of contractors who are brought on the line for the purpose of repairing the works of a railway do not suffer personal injury from the passing train. So far from the judgments below, as reported, bearing this out, they seem to assume the very contrary, and to proceed on the assumption that there is no such general duty; yet as, in this case, the company had at an earlier time provided a look-out man, this was sufficient to warrant leaving the case to the jury to decide whether a special obligation—not belonging to the class of cases, but the peculiarity of this individual case—had been constituted.¹

The exact effect of an obligation to take reasonable care that the servants of contractors are not injured varies very much with the sense in which the words are to be understood. If the meaning is that the employer is bound neither to conceal, nor to increase, the risk of his premises, the proposition is in entire accord with *Griffiths v. London and St. Katharine Docks Company*.² If the meaning is that, after work has been contracted to be done on premises in their existing condition, it is the duty of the employer to alter them in the direction of greater safety, the principle is dependent on the assertion of it in this case, and has nowhere else authority for its support. If the former is the meaning, and an obligation to use reasonable care is taken for granted, it is common ground that the obligation was discharged. If the latter, then, it is the very point to be decided.³

¹ Cp. *Loader v. London and India Docks Joint Committee*, 8 Times L. R. 5 (C.A.).

² 13 Q. B. D. 259.

³ In *MacCarthy v. Young*, 6 H. & N. 329, it was decided that a servant had no greater right than his master, where the master was the gratuitous bailee of a defective scaffolding, of whose defects the bailor was ignorant.

We are then to consider the matter on principle. In the ^{View of} ~~view of~~ Baggallay, L.J., the case was not to be distinguished in ^{Baggallay,} ~~principle~~ from *Indermaur v. Dames*. There the rule laid down was that "the occupier should use reasonable care to prevent damage from unusual danger which he knows or ought to know." The stress of the proposition lies in the word "unusual"; if the proposition were—omitting the word unusual—"the occupier should use reasonable care to prevent damage from danger which he knows or ought to know," the case would run counter to *Bartonshill Coal Company v. Reid*,¹ in the House of Lords (where Lord Cranworth says: "When the workman contracts to do work of any particular sort, he knows, or ought to know, to what risk he is exposing himself"); and to the whole of those cases which recognize the principle laid down by Bramwell, B., in *Dynen v. Leach*.² "There is nothing legally wrongful in the use by an employer of works or machinery more or less dangerous to his workmen, or less safe than others that might be adopted. It may be inhuman so to carry on his works as to expose his workmen to peril of their lives, but it does not create a right of action for an injury which it may occasion when, as in this case, the workman has known all the facts, and is as well acquainted as the master with the nature of the machinery, and voluntarily uses it."

In *Indermaur v. Dames* there was an "unusual" danger in the sense that the plaintiff was exposed to a risk well known to the occupier of the premises, but unknown to the plaintiff, that might have been made apparent, and so guarded against, but which was concealed from the plaintiff, and thus turned into a trap. In *Woodley's* case there was no "unusual" danger. The traffic differed nothing from the ordinary traffic; and from the very nature of the business of a railway company it must have been as well known to the plaintiff as to the manager of the company that at certain fixed intervals trains proceeded along the lines at a regulated rate of speed; so that there could be nothing in the nature of a trap where the danger was from a well-known and regularly recurrent hazard, encountered every six or ten minutes for a fortnight, and, when ultimately injurious, differing nothing from what had been innocuous for a fortnight, and had been in progress at and before the time of making the contract. Moreover, in *Indermaur v. Dames* a crucial distinction was drawn³ between workmen acquainted with the character of premises and

Indermaur v. Dames and Woodley v. Metropolitan Railway Company compared.

¹ 3 Macq. (H. L. Sc.) 266.

² 26 L. J. Ex. 221.

³ See Kelly, C.B's., judgment in Ex. Ch. L. R. 2 C. P. at 313.

those ignorant of it. The plaintiff in *Indermaur's* case came under the former class; in *Woodley's*, under the latter. In *Indermaur's* case the danger was unforeseen, because there were no means of knowing it; in *Woodley's*, not unforeseen, but only unguarded against.

View of
Mellish, L.J.

On the same side is the unsurpassed legal acumen and knowledge of Mellish, L. J. His main position is that every person who carries on a dangerous trade is bound to take reasonable care that no other person (not being his own servant) suffers a personal injury from the manner in which his trade is carried on. From this he concludes that there was a greater amount of care due from the company to *Woodley* than from the company to their immediate servants; that, in short, *Woodley* stood with respect to the company in no different position from that of a customer invited on their premises. *Woodley's* employer it is true, may contract with the defendants to do dangerous work, but so soon as *Woodley* arrives on the ground the defendants are under a duty to reduce the danger.

Criticized.

It is observable the Lord Justice assumes that, if the relation between the company and the injured man is not that of master and servant, it must be some relation involving a more extensive duty. This, however, is precisely the point at issue; and the assumption of the Lord Justice that there cannot be a third state—not that of the mere relation of master and servant, and not that of the relation of occupier of property and one on the property upon lawful business, and not upon bare permission—though having the high sanction of the Lord Justice's authority—does not commend itself on independent reasoning. During the performance of the work under the contract, the ordinary traffic of the railway goes on uninterrupted. The workmen are, indeed, entitled to be protected from having the risks increased, but the very condition, under which they are there, is doing the work without interfering with the normal course of the business.

Mellish, L.J.'s,
illustration of
the hansom
cabman.

Did then *Woodley* possess greater rights against the company than his employers? "Suppose this case," says the Lord Justice: "a man is employed by a contractor for cleansing the street, to scrape a particular street, and for the space of a fortnight he has the opportunity of observing that a particular hansom cabman drives his cab with extremely little regard for the safety of the men who scrape the streets. At the end of a fortnight the man who scrapes the streets is negligently run over by the cabman. An action is brought in the county court, and the cabman says in his defence: 'You know my style of driving; you have seen me

¹ 2 Ex. Div. 384, at 394.

drive for a fortnight; I was only driving in my usual style.' 'Yes, but your usual style of driving is a very negligent style, and my having seen you drive for a fortnight has nothing to do with it.' It will not be disputed the scraper of the streets in the case I have supposed is entitled to maintain his action, and, in my opinion, his case does not differ from the case we have to determine, there being no contract between the defendant and the plaintiff any more than between the cabman and the scraper of the streets."

This illustration appears to be directed to shew that the fact Examined. of there being no contract between the plaintiff and defendant constitutes a greater liability on the part of the railway company towards Woodley. In the illustration the scraper has a right, independently of the hansom cabman, to be in the road; in the case the plaintiff has no right, independently of the invitation of the railway company, on their line. From this it follows that the hansom cabman has no right to impose terms as to the user of the road, while the railway company may impose terms as to the execution of works on their lines. The right of the hansom cabman is merely to use the road for driving along, subject to the rights of all other people; that of the railway company is to carry on their business in the ordinary way, unless they disentitle themselves to do so. The cabman in the illustration drove negligently. If there had been negligence in the actual driving of the train there would have been liability. The negligence alleged is not in the train, which runs as ordinarily, but in not altering the course of business to give additional protection to the workman. If the style of driving of the hansom cabman is negligent, each repetition is an aggravation of his offence, as, apart from contract, he can have no legal justification for his conduct. If the running of trains in the ordinary manner is negligent, the doing so is not a tortious act in itself, but may become one with reference to the acquired rights of licensees upon the company's premises. The contract with Woodley's employer was either to perform the work, the company on their part undertaking to make provision against the risks, or some of the risks of it; or, Woodley possessed greater rights against the company than his employer.

What ground is there, then, for assuming that the company's Contract considered. contract with their contractor contained implied terms that are never suggested as expressed? The course of conduct on both sides—the uncomplaining working of the men with such hazardous accompaniments—the ordinary conduct of their business by the company—indicates a contract to do the work during the continuance of the ordinary risks arising from the traffic. The contractor

might very reasonably contract to perform the work without impeding the work of the railway; and if he did he would receive an extra payment for the difficulties and risk he by so contracting undertook to encounter; on their part, too, the men are free to make a similar contract. Now, if any contract of the sort indicated were made with the contractor, it would be useless, unless the men were included in its terms. The position of the railway company is that they admit workmen to their lines to work there on the condition that the ordinary traffic is not to be interfered with. If there is actual negligence in running the trains, there is a breach of the condition. But if the contractor does not communicate the condition under which he undertook the work to the men, have they any greater rights than he has? Assuredly not, in the absence of unusual danger—that is, unusual danger for the character of the work, since the contract is with reference to the work.

Ground of servants' disability at common law.

The common law principles, on which the liability of the master for the acts of his servants are based, differ according as the acts affect persons without the limits of the employment, and as they affect persons within the employment. A person without the limits of the employment sustaining injury has a right to say, "I was not a party to your act. If you chose so to do or cause to be done, I must look to you for redress"; for, as "a large portion of the ordinary acts of life are attended with some risk to third persons, and no one has a right to involve others in risks without their consent," where there is no submission to such risks, no disability from obtaining redress for injury can arise. Within the limits of the employment the principle of the master's exemption from liability is that the workman knows to what risks he is exposing himself; if want of care occur, and injury result, he cannot say he does not know who is to blame; neither can he say that the master need not have engaged in the work, for he himself is a party to its being undertaken.¹

What implied terms are to be read into the contract?

The question, then, comes to this—to which of these classes is the liability of the company in Woodley's case to be referred? Admitting he is not the servant of the company, yet, as regards knowledge of the danger and acquiescence in it he cannot well be put in the same class as the injured plaintiff in *Indermaur v. Dames*; and it is submitted to be more consistent, both with the facts of the case and also with legal principle, to hold that the contract was to do the work under the conditions of the ordinary

¹ See per Lord Cranworth, in *Bartonshill Coal Company v. Reid*, 3 Macq. (H. L. Sc.) 266, at 283, 284, of which passage the statement in the text is an adaptation.

traffic of the line, than to assume a legal obligation to guard the workman against manifest and regularly recurrent danger just as if he stood on the footing of a stranger invited to the dangerous place on business and not apprised of the danger. If that were the contract made with the contractor, the workmen entered on the work under the same conditions as those on which the work was let out, and there was no liability on the railway company.

It is further urged that the plaintiff could not be looked on as a volunteer. "I think," says the Lord Justice, "assuming that he did understand what the risk was which he was running, he is entitled to say, 'I know I was running great risk, and did not like it at all, but I could not afford to give up my good place, from which I get my livelihood, and I supposed that if I was injured by their carelessness I should have an action against the company, and that if I was killed my wife and children would have their action also.'"

Not a volunteer.

Later cases¹ have conclusively shown that a workman is entitled to say this in the case of an alteration in the conditions of his employment. The present case is very different; for to allow a workman to accept work in circumstances of risk and when he has entered on it to say: "I know I am running great risk, but I cannot afford to give up my good place, and I suppose if I am injured I shall have an action against the company," would be to permit him tacitly and without a hint to his employer to vary the contract by diminishing the risks, while continuing the employment; though the other class of cases denies to the employer the right of increasing the risks without the most unequivocal making of a new contract.

In *Thrussell v. Handyside*,² Hawkins, J., distinguished *Woodley v. Metropolitan District Railway Company*.³ A workman was directed by his employer to work in a particular place. The defendants were contractors working above the place where the plaintiff was engaged at his work. For some time the defendants' work was carried on in a manner that obviated danger of injury, but *subsequently* the plaintiff's employers required the safeguard which protected the plaintiff to be removed so that they might more speedily accomplish their own work on which the plaintiff was engaged. No other safeguards were substituted. Plaintiff complained to the defendants' foreman of the danger from their

Thrussell v. Handyside.

¹ *E.g.*, *Thomas v. Quartermaine*, 18 Q. B. Div. 685, per Fry, L.J., at 701, expressing concurrence with the view of Cockburn, C.J.; *Smith v. Baker* (1891), App. Cas. 325. Cp. *Membery v. Great Western Railway Company*, 14 App. Cas. 179, per Lord Halsbury, C., at 184, and per Lord Herschell, at 192.

² (1888) 20 Q. B. D. 359. Cp. *Casey v. Sinclair*, 23 Sc. L. R. 305.

³ 2 Ex. Div. 384.

Distinguished
from *Woodley*
v. Metropolitan District
Railway
Company.

operations to which he was exposed, but without result, though it was proved that satisfactory precautions could have been easily taken if desired. Plaintiff was injured by the falling of an iron bolt from the work carried on by the defendants above where he was placed, and brought his action. On appeal by the defendants from the county court to the Divisional Court, it was contended that *Woodley v. Metropolitan District Railway Company* was in point.¹ Hawkins, J., however, pointed out that in *Woodley's* case the plaintiff was injured through a regularly recurrent danger, which the exercise of foresight would have obviated; while in *Thrussell's* case the danger was intermittent, and not to be avoided consistently with a continuance of the employment. In addition to this, it may be noted that, in *Woodley's* case, the running of the trains was in the ordinary course of business and without negligence, and the duty sought to be imposed upon the railway company was that of taking extra precautions to secure the safety of the workman; while in *Thrussell's* case an ordinary means of doing the work in safety—"in order to do this work and to hoist the plates a large stage had been erected which was called a gantry"²—had been abandoned for other means not safe. The removal of the workman in *Woodley's* case is not paralleled by the alteration in the *mode* of doing the work, since the cessation of extra precautions differs widely from the abandonment of ordinary ones.³ Neither does the fact that the abandonment of the first mode of working was at the request of the plaintiff's employers affect the nature of his claim, which appears almost identical with *Smith v. Baker*.⁴ That a workman's employer has for his own purposes made arrangements with third persons without reference to his workman cannot, in the absence of special circumstances, alter the conditions of the workman's employment. It remains that a dangerous method of working was deliberately undertaken, with the effect of injuring some one who had not contracted to encounter the risk, and who, therefore, became entitled to recover in respect of his injury. In this view *Woodley's* case has little, if any, bearing on the present.

¹ 2 Ex. Div. 384.

² 20 Q. B. D. 359, at 361.

³ Altogether apart from the fact that in *Woodley's* case the look-out man had not been employed in the same work, but per Kelly, C.B., 2 Ex. D. at 386, "on some former occasion, or on some other part of the same railway."

⁴ (1891) App. Cas. 325.

CHAPTER II.

WATER AND WATERCOURSES.

THE collection, distribution, and user of water on a man's estate raise questions of difficulty more proper to the law of easements than to that of negligence. The subject, however, involves many points of the highest importance with reference to the exercise of control over property and cannot be passed over here. We have therefore to consider the relations raised—I. By water brought on land by the intervention of an artificial agency; II. By water coming upon land by the operation of natural causes merely.

Division of the subject.
I. Relations raised by water brought on land.
II. Relations raised by water coming upon land.
Distinction.

Under the first class a distinction must be noted between (a) water brought on land with reference to the right of the landowner bringing it there alone, and (b) water brought on land where a contractual relationship has been constituted between the landowner and others liable to be affected by the bringing of water there. Under the second class of cases we shall consider, first, water running in defined channels, whether natural or artificial, as it is surface water or subsoil water; and, secondly, water not running in any channels; and this also under the two heads of surface water and subsoil water.

I. WATER BROUGHT ON LAND.

The principle of liability involved in bringing water on land applies equally to every material which, being brought or stored on land, is likely to be dangerous or mischievous; and is thus very much wider than a principle applicable to the case of water alone.

Principle involved not confined to water.

The duty of a man, to keep in what he has brought upon land and stores there, so that it may not escape and damage his neighbours, has been admitted on all hands, both here and in America. Whether this duty is an absolute duty, or no more than a duty to take all reasonable and proper precautions, has been the subject of very considerable controversy.

The inquiry whether the duty is absolute or merely to use reasonable precautions.

The first view is that the person who brings anything dangerous on his land and fails to keep it in, is responsible for all the natural consequences of its escape. The second limits his responsibility to the case of actual negligence, and exonerates him from the consequences of an escape arising from any defect not to be detected by ordinary prudence and skill.

Reasoning in support of a duty merely to use reasonable precautions.

The rule expressing this second view is that the plaintiff must come prepared with evidence to show that the *intention* is unlawful, or that the defendant is in *fault*; for, if the injury is unavoidable and the conduct of the defendant is free from blame, he will not be held liable.¹ This view has been supported by reasoning drawn from the nature of civil society, in which a principle of cession of natural rights, and compensation for their surrender, runs through the whole of the legal system of civilized States. I may not place or keep a nuisance upon my land to the damage of my neighbour, and I have my compensation for the surrender of this right to use my own as I will, by the similar restriction imposed upon my neighbour for my benefit. I hold my property subject to the risk that it may be unavoidably or accidentally injured by those who live near me, and as I move about upon the public highways and in all places where other persons may lawfully be, I take the correlative risk of being accidentally injured in my person by them without fault on their part.

Not adopted by the law of England.

This train of reasoning, however, has not been adopted in the law of England, which draws a distinction between those cases where injury is done to personal property, or even to the person, by collision, and that description of accident; and those cases where injury results from the collecting anything on land likely to do mischief if it escapes, and which does escape, even though without negligence.

It is agreed on all hands that traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk. That being so, those who go on the highway, or have their property adjacent to it, may well be held to take upon themselves the risk of injury from dangers incidental to the situation. "Persons who, by the licence of the owner, pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident";² and Blackburn, J., further suggests

¹ *Brown v. Kendall*, 60 Mass. 292; *Losee v. Buchanan*, 51 N. Y., 476, followed and the grounds of it amplified in *Cosulich v. Standard Oil Company*, 122 N. Y. 475, 19 Am. St. R. 475.

² Per Blackburn, J., *Fletcher v. Rylands*, L. R. 1 Ex. 265, at 286.

that "all the cases in which inevitable accident has been held an excuse for what *prima facie* was a trespass, can be explained on the same principle—viz., that the circumstances were such as to shew that the plaintiff had taken that risk upon himself."

What the duty of a man is, who has brought anything on his land, was fully discussed and finally settled so far as English case law goes, in the case just referred to, of *Fletcher v. Rylands*.¹ The plaintiff was damaged by his property being flooded by water, which, without any fault on his part, broke out of a reservoir constructed on defendants' lands by defendants' order, and maintained by the defendants. The majority of the Court of Exchequer—Pollock, C.B., and Martin, B.—were of opinion the plaintiff could not recover, Bramwell, B., dissenting. The Exchequer Chamber upheld Bramwell, B.'s, opinion, and their judgment was upheld in the House of Lords, Lord Cairns, C., reading at length Blackburn, J.'s, statement, in which he said: "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major* or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir,² or whose cellar is invaded by the filth of his neighbour's privy,³ or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works,⁴ is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there) harmless to others, so long as it is confined to his own property, but which he knows will be mischievous if it gets to his neighbour's, should be obliged to make good the damage which ensues if he

The law discussed and settled in *Fletcher v. Rylands*.

Rule formulated by Blackburn, J., in the Exchequer Chamber adopted in the House of Lords.

¹ 3 H. & C. 774, L. R. 1 Ex. 265, L. R. 3 H. L. 330.

² *Harrison v. Great Northern Railway Company*, 3 H. & C. 231.

³ *Tenant v. Goldwin*, 1 Salk. 21, 360, 2 Ld. Raym. 1089, 6 Mod. 311. In *Humphries v. Cousins*, 2 C. P. D. 239, a drain case, the defendant's duty was expressed to be—to keep the sewage which he was himself bound to receive from passing from his own premises to the plaintiff's premises otherwise than along the old accustomed channel. Cp. *The Chandler Electric Company v. Fuller*, 21 Can. S. C. R. 337.

⁴ *St. Helens Smelting Company v. Tipping*, 11 H. L. C. 642.

does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority this, we think, is established to be the law, whether the things so brought be beasts,¹ or water,² or filth,³ or stench.⁴ This then may be accepted as embodying the settled law.

In *National Telephone Company v. Baker*,⁵ the principle of *Fletcher v. Rylands* was applied to the case of an electric current discharged into the earth. "I cannot see my way," says Kekewich, J., "to hold that a man who has created, or if that be inaccurate, called into special existence an electric current for his own purposes, and who discharges it into the earth beyond his control, is not as responsible for damage which that current does to his neighbour, as he would have been if, instead, he had discharged a stream of water. The electric current may be more erratic than water, and it may be more difficult to calculate or control its direction or force; but when once it is established that the particular current is the creation of or owes its special existence to the defendant, and is discharged by him, I hold that if it finds its way on to a neighbour's land, and there damages the neighbour, the latter has a cause of action."⁶

This being the rule, it will be noted that its generality is limited by four exceptions—

I. Where the damage to the plaintiff arises from the natural user of land—a user, that is, for which it may in the ordinary course of the enjoyment of land be used.

II. Where the damage to the plaintiff is caused by his own default.

III. Where the damage to the plaintiff is the consequence of *vis major* or the act of God.

IV. Where the damage is the consequence of accumulation for public purposes under the express authority of a statute.

These cases we shall now proceed to consider :

¹ *May v. Burdett*, 9 Q. B. 101; *Cox v. Burbidge*, 13 C. B. N. S. 430; 1 Hale, *History of the Pleas of the Crown*, 430.

² *Baird v. Williamson*, 15 C. B. N. S. 376; *Smith v. Kenrick*, 7 C. B. 515.

³ *Tenant v. Goldwin*, 1 Salk. 21, 360, 2 Ld. Raym. 1089, 6 Mod. 311.

⁴ *Bamford v. Turnley*, 3 B. & S. 62, at 83; *Tipping v. St. Helens Smelting Company*, 4 B. & S. 608, 11 H. L. C. 642.

⁵ (1893) 2 Ch. 186, at 201.

⁶ In the United States in *Cumberland Telephone and Telegraph Company v. United Electric Railway*, 42 Fed. Rep. 273, it was held that a telephone company could not maintain an action against an electric railway company for injury sustained by the escape of electricity from the rails; and that the test was, whether the injurious company was making use of the best means then known to science in the lawful user of their own property. The principle of *Fletcher v. Rylands* was not accepted.

Rule limited by four exceptions :
I. Where damage arises from the natural user of land ;
II. Where damage is caused by the default of the sufferer ;
III. Where damage is the consequence of *vis major* ;
IV. Where the damage is the result of statutory enactment.

I. Where the damage to the plaintiff arises from the natural user of land.

I. Damage arising from the natural user of land. *Bamford v. Turnley*.

The natural user of land is stated by Bramwell, B., in *Bamford v. Turnley*¹ to mean "those acts necessary for the common and ordinary use and occupation of lands and houses," and which may be done without subjecting those who do them to an action. For instance, in *Wilson v. Waddell*² the House of Lords decided that "the owner of the minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user of minerals"; and, by consequence, when the minerals are removed, he is not liable for the accelerated passage to his neighbour's land of water naturally coming to his own. The other side of the rule is exemplified by *Hurdman v. North-Eastern Railway Company*,³ where the surface of the defendant's land had been artificially raised by earth placed thereon, and *in consequence*, rain-water, falling on defendant's land, made its way through defendant's wall into the house of the plaintiff adjoining, and caused substantial damage. On demurrer this was held to constitute a good cause of action; since the heap on the defendant's land must be considered an artificial work; and the effect of this being to *cause* water, even though arising from natural rainfall only, to pass into his neighbour's land, and thus substantially to interfere with his enjoyment, rendered him liable. The point of the decision is that the act of the defendant in doing what was not an act in the course of the natural user of property, threw a greater burden on his neighbour than would naturally have fallen to him.

Wilson v. Waddell.

Hurdman v. North-Eastern Railway Company.

In *West Cumberland Iron and Steel Company v. Kenyon*⁴ the dealing with the water was exclusively on the defendant's land; when the water left the defendant's land it all naturally found

West Cumberland Iron and Steel Company v. Kenyon.

¹ 3 B. & S. 62, at 83, at *Nisi Prius*, 2 F. & F. 231; overruling *Hole v. Barlow*, 4 C. B. N. S. 334. See *Cavey v. Ledbitter*, 13 C. B. N. S. 470.

² 2 App. Cas. 95, per Lord Blackburn at 99.

³ 3 C. P. Div. 168. *Barkley v. Wilcox*, 86 N. Y. 140, is a somewhat similar case, where a different decision was come to. There, by the building of the defendant, water was prevented naturally flowing from the plaintiff's land, and flooded his cellar. Held, that "to adopt the principle that the law of nature must be observed in respect to surface drainage would, we think, place undue restriction upon industry and enterprise, and the control by an owner of his property."

⁴ 11 Ch. Div. 782. The American and English cases on what is the natural and lawful use of land are collected in *Pennsylvania Coal Company v. Sanderson*, 113 Pa. St. 126, at 162, where it is held that one working a coal mine in the usual manner may discharge the percolating water into a stream which naturally drains the land. This is not universally recognized in America: *Red River Roller Mills v. Wright*, 44 Am. R. 194; and is not the law in England. See *Aldred's case*, 9 Co. Rep. 57 b, at 59 a, where it is said that "if a man has a watercourse running in a ditch from the river to his house, for his necessary use; if a glover sets up a lime-pit for calve-skins and sheep-skins so near the said watercourse that the corruption of the lime-pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it, as it is adjudged in Y. B. 13 Hen. VII. 26 b; and this stands with the rule of law and reason;

its way down to the plaintiffs' levels in the same way, at the same point, and in the same quantity as it would if uninterfered with by the defendant. That being so, the Court of Appeal held that the defendant had a right to say, "What is it to you what I have been doing on my own land? The same quantity of water leaves my land, and leaves my land through exactly the same aperture, and gets into your field in exactly the same way, as it did before."¹

Whalley v.
Lancashire
and Yorkshire
Railway
Company.

The fact that in *West Cumberland Iron and Steel Company v. Kenyon* the burthen on the neighbouring proprietor was increased by the use made of the water by the defendant distinguishes this case from *Whalley v. Lancashire and Yorkshire Railway Company*,² where through the defendant's act a greater amount of injury was done to the plaintiff than would have been done by the passage of water in its ordinary course. The total amount discharged was not greater, but the manner of its discharge was more burthensome; and the defendants had no right to impose this greater or different obligation on their neighbours. The circumstances of *Whalley's* case imposed a barrier to the passage of flood water, there being a statutory authorization to construct an embankment which would have justified the defendants had the damage occurred through the penning up of waters by the embankment. But they were not content with the effects worked by the flood and the embankment; to protect their embankment from the pressure of the water, they cut trenches in it, by which the water flowed through and flooded the plaintiff's land. The defendants' liability was accordingly based on their aggravation of the consequences of the flood to their neighbour in an endeavour to lighten the burthen on their own property.

Ballard v.
Tomlinson.

An additional factor, that of contamination, was introduced in *Ballard v. Tomlinson*.³ The defendant used a well on his land for the reception of sewage, whereby filth percolated through into a well of his neighbour's—the plaintiff's—on a lower level. The case appears exactly covered by *Tenant v. Goldwin*:⁴ "He whose dirt it is must keep it that it may not trespass"; and was decided by Cotton and Lindley, L.JJ., on grounds applicable to

sc. Prohibetur ne quis faciat in suo quod nocere possit alieno: et sic utere tuo ut alienum non lædas. Vide in the Book of Entries, tit. Nuisance, 406 b." See, too, *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R. 1 Eq. 161, at 169; L. R. 1 Ch. 349; *Crossley v. Lightowler*, L. R. 2 Ch. 478; *Pennington v. Brinsop Hall Coal Company*, 5 Ch. D. 769. In *Crossley v. Lightowler*, L. R. 2 Ch. 478, the question of intention to abandon an easement was held a question of fact to be decided in each particular case.

¹ 11 Ch. Div. 782, per James, L.J., at 787.

² 13 Q. B. D. 131.

³ 29 Ch. Div. 115; *Kinnaird v. Standard Oil Company*, 25 Am. St. R. 545.

⁴ 1 Salk. 21, 360, 2 Ld. Raym. 1089, 6 Mod. 311.

that case. Brett, M.R., however, was of opinion that the shaft of the well was an "artificial thing," and "that the defendants therefore collected a quantity of sewage into an artificial reservoir."¹ Judgment of
Brett, M.R.

After the decision in *Rylands v. Fletcher*,² recognizing the authority of *Tenant v. Goldwin*, whether the constructing a well were a natural or a non-natural user of land, in either case the fact of an escape of things brought on land, "whether the things so brought be beasts, or water, or filth, or stench,"³ raises a legal obligation to compensate for the damage done thereby; and the question of the property in the percolating water is, in any event, immaterial, if, as is on authority undoubted, the plaintiff has a right to have his land and the enjoyment of it free from the defendant's filth; since, if the percolating water as befouled is the property of the defendant, he is bound to retain it. If it is not his property, he has, at any rate, no greater rights over it than if it were his property. The right of action is therefore undoubted, irrespective of where the defendant may store his sewage, or whether he stores it at all. Considered.

The digging of a well is not, then, an essential element in founding the action; it is but a circumstance in the development of the injurious agency. In *Hurdman v. North-Eastern Railway Company*,⁴ for instance, the placing of the heap was the cause of a greater flow of water to the plaintiff's property than would otherwise have gone there, and therefore actionable. In the present case the right of action is, not in respect of digging the well, but in respect of a particular user of it—for sewage. It is not increase of quantity, but difference in kind—filth, not water—that is brought on the plaintiff's property. There was an absolute duty to prevent filth brought on one's own land anyhow—whether by well or otherwise is not essential—flowing into the neighbour's land. That filth flowed *by the well* was an accident only—the essence of the wrong was the flowing at all—not affected by whether the having a well was a natural or non-natural user of the land.

Then, is a well an "artificial thing" so as not to admit of being used for any of the class of purposes, mentioned by Lord Cairns,⁵ "for which it might in the ordinary course of the enjoyment of land be used." If it be excluded, water naturally filtering into a well, and so percolating to a neighbour's property, would lay the foundation

¹ 29 Ch. Div. 115, at 120.

² L. R. 3 H. L. 330.

³ Per Blackburn, J., cited by Lord Cairns, C., *Rylands v. Fletcher*, L. R. 3 H. L. 330, at 340.

⁴ 3 C. P. Div. 168.

⁵ *Rylands v. Fletcher*, L. R. 3 H. L. 330, at 338.

for an action by him ; if it be not excluded, then no right of action could accrue. But it has been decided in *Chasemore v. Richards*¹ that a landowner has a right to take subterranean water even to the detriment of his neighbour. Then may he not dig for it ? In *Wilson v. Waddell*,² also in the House of Lords, it was decided that the digging mines for minerals is a natural use of land within Lord Cairns's exception ; and it seems hard to draw a distinction between the consequences of digging for water to which a man has a right and digging for minerals to which he has a right ; if the digging for minerals is a "natural purpose" in the ordinary course of the enjoyment of land, there is no reason apparent why digging for water should not come under any other rule. In many country districts the possession of a well is essential to the development, or even to the user of property in any mode whatever ; while the digging minerals is merely a particular use of property, and, in an intelligible sense at least, not a natural user of it."³

What is a
natural user ?

*Smith v.
Fletcher.*

*Crompton v.
Lea.*

What constitutes a natural use of land in law must be a matter to be determined in each case rather by what is customary and suited to the particular circumstances of place than by any certain rule of law.⁴ The neglect of this consideration was the ground of the reversal of the judgment of the Court of Exchequer in *Smith v. Fletcher*.⁵ The Exchequer Chamber held that "the opinion of the jury should be taken as to whether what was done by the defendants was done in the ordinary, reasonable, and proper mode of working the mine ;" while in *Crompton v. Lea*⁶ a demurrer to a bill averring that a mine which the defendants threatened to work could not be worked without letting in a river and flooding defendant's mine, and, through that, the plaintiff's mine, was overruled, because the right to work the mine was not an absolute right, but only a right to work the mine in an ordinary, reasonable, and proper way, which must be matter of evidence.

*Armistead v.
Bowerman.*

In the Scotch case of *Armistead v. Bowerman*⁷ a claim was

¹ 7 H. L. C. 349.

² 2 App. Cas. 95.

³ For example :

"And that it was great pity, so it was,
This villainous saltpetre should be digg'd
Out of the bowels of the harmless earth,
Which many a good tall fellow had destroy'd
So cowardly."—SHAKESPEARE, *Henry IV.* act i. sc. 3.

⁴ *Turberville v. Stampe*, 1 Ld. Raym. 264, 1 Salk. 13 ; *Filliter v. Phippard*, 11 Q. B. 347.

⁵ L. R. 9 Ex. 64, at 67. See *Fletcher v. Smith*, 2 App. Cas. 781, where the case, after the second trial ordered by the Ex. Ch., was taken to the House of Lords.

⁶ L. R. 19 Eq. 115.

⁷ 15 Rettie, 814.

made by the proprietor of a "fish hatchery" against the purchaser of timber higher up the stream for dragging it across the stream which fed the "fish hatchery," and thereby damaging it. It was held that, apart from a reservation in the pursuer's grant enabling timber to be removed without derogation from it, the pursuer had no right to recover, since the defendant was only performing an ordinary and legitimate operation in the ordinary and usual way.

In another Scotch case in the House of Lords, *Young v. Bankier Distillery Company*¹ water was pumped into a stream by an upper proprietor, thereby increasing its volume and impairing its purity, and, so far as contamination was concerned, to the detriment of a lower proprietor. The House of Lords, affirming the Court of Session and approving *Baird v. Williamson*,² held the action of the upper proprietor to be unlawful. "The right of the upper heritor," says Lord Watson,³ "to send down, and the corresponding obligation of the lower heritor to receive natural water, whether flowing in a defined channel or not, and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them. The lower heritor cannot object so long as the flow whether above or below ground is due to gravitation, unless it has been unduly and unreasonably increased by operations which are *in æmulationem vicini*. But he is under no legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means; and I can see no distinction in principle between water raised from a mine below the level of the surface of either property, which is the case here, and water artificially conveyed from a distant stream. The law of Scotland upon this point is the same with that of England."⁴

Young v. Bankier Distillery Company.

II. Where the damage to the plaintiff is caused by his own default.

II. Damage caused by the plaintiff's default.

This is the ordinary case of contributory negligence. The proposition which the plaintiff has to prove in order to found a right of action is that damage is caused by the defendant's act; if it is caused by his own, he has not discharged the *onus* upon him.⁵

III. Where the damage to the plaintiff is the consequence of *vis major*, or the act of God.

III. Damage caused by *vis major*.

In *Rylands v. Fletcher*⁶ the position of a landowner from

¹ (1893) App. Cas. 691.

² 15 C. B. N. S. 376.

³ (1893) App. Cas. 691, at 696.

⁴ See *Blair v. Hunter, Finlay & Co.*, 9 Macph. 204, at 207.

⁵ *Wakelin v. London and South-Western Railway Company*, 12 App. Cas. 41.

⁶ L. R. 3 H. L. 330. There is a New South Wales case, *M'Mahon v. Commissioners for Railways*, 4 N. S. W. R. (Law) 170, as to the liability for not providing sufficient means to carry off rain water which caused injury to goods deposited in a store.

Nichols v.
Marsland.

whose land an injurious agency has been released by *vis major* was not determined, but it was rather suggested to be as an exception to the universality of the rule there laid down. The point, however, very shortly afterwards arose in *Nichols v. Marsland*.¹ Defendant was the owner of a series of artificial ornamental lakes formed by damming up a natural stream into pools. In consequence of a most unusual fall of rain these lakes overflowed, and the water thus overflowing swept away county bridges lower down the stream. The jury found that there was no negligence, but that, had the flood been anticipated (which it could not reasonably have been), the result might have been prevented. On motion to enter the verdict for defendant, the Court of Exchequer made a rule absolute to that effect, which was sustained in the Court of Appeal, where the judgment was delivered by Mellish, L.J., who had been counsel in *Rylands v. Fletcher*.

Judgment of
Mellish, L.J.

The ordinary rule of law is that where a duty is raised by implication of law, and the person bound is unable to perform it, without default of his own, by the act of God or the King's enemies, the law will excuse him ; but where a person contracts for the performance of anything, he is bound, though incapacitated to perform it by accident or inevitable necessity.² The duty to keep in water is a duty imposed by law, and not one created by contract, and the wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape. "If," said Mellish, L.J., "the damages were occasioned by the act of the party without more—as where a man accumulates water on his own land, but owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbour—the case of *Rylands v. Fletcher*³ establishes that he must be held liable. The accumulation of water in a reservoir is not in itself wrongful, but the making it and suffering the water to escape, if damage ensue, constitute a wrong. But the present case is distinguished from that of *Rylands v. Fletcher* in this, that it is not the act of the defendant in keeping this reservoir—an act in itself lawful—which alone leads to the escape of the water, and so renders wrongful that which but for such an escape would have been lawful. It is the supervening *vis major* of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would have been innocuous), causes the disaster. A defendant cannot, in our opinion, be properly said to have caused or allowed the water to escape if the act of God or the Queen's enemies was

¹ L. R. 10 Ex. 255, 2 Ex. Div. 1.

² *Paradine v. Jane*, Aleyn (K. B.) 26, at 27.

³ L. R. 3 H. L. 330.

the real cause of its escaping, without any fault on the part of the defendant. If a reservoir was destroyed by an earthquake, or the Queen's enemies destroyed it in conducting some warlike operation, it would be contrary to all reason and justice to hold the owner of the reservoir liable for any damage that might be done by the escape of the water."

In the Court of Exchequer,¹ Bramwell, B., drew a distinction between agencies set in motion by *vis major* in "cases of a reasonable use of property in a way beneficial to the community," and in cases where a dangerous agency is kept for mere amusement. "Could it be said," he says, "that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or an earthquake? If so, it would be dangerous to have a tree, for a wind might come so strong as to blow it out of the ground into a neighbour's land and cause it to do damage; or a field of ripe wheat, which might be fired by lightning, and do mischief." And, on the other hand, "I am by no means sure that if a man kept a tiger, and lightning broke his chain and he got loose and did mischief, that the man who kept him would not be liable."

Distinction drawn by Bramwell, B., between beneficial user and user for purpose of mere amusement.

If the keeping of a tiger is unlawful this is clear. But "though a person who keeps such an animal is bound so to keep it that it shall do no damage,"² the keeping itself is nowhere declared to be unlawful. If not unlawful, how does it differ from the keeping of water penned up for ornament and amusement, the escape of which by the agency of *vis major* might sweep off a hamlet or devastate a county? while the utmost rage of a tiger thus loosened would be far less widely destructive.

The keeping of water, as in *Nichols v. Marsland*, is not "a reasonable use of property in a way beneficial to the community" in any other sense than the conferring of pleasure makes it so: then how can it be entitled to the advantage of Bramwell, B.'s, exception in its favour to the exclusion of the tiger, the inspection of whom is a pleasure not different in nature from the inspection of the ornamental lakes?

Again, the storing of gunpowder under the regulations of Act of Parliament is not unlawful. It may be "a reasonable use of property in a way beneficial to the community": for example, when it is kept for blasting in mining operations—a natural use of land; or it may be a dangerous agency kept for mere amusement, for making fireworks or for use in shooting.

¹ L. R. 10 Ex. 255, at 259, 260.

² Crowder, J., *Besozzi v. Harris*, 1 F. & F. 92; *Filburn v. People's Palace and Aquarium Company*, 25 Q. B. Div. 258.

Can it be contended that the obligations imposed on the owner vary as his intention—maybe his secret intention—varies?

Two classes of cases which are the subject of different considerations seem to have become regarded as merely interchangeable—viz., the class of dangerous agencies (a phrase usually carrying with it some suggestion of a danger to human life); and the class of things which a man, having brought on his land, is bound to keep from invading his neighbour's.

As to the former class, that of dangerous agencies, the liability of the owner is dependent entirely on negligence—according to the definition of Willes, J., “absence of care according to the circumstances.” They may be most absolutely beneficial; still, the care in guarding them must be unremitted; yet to found an action some negligence must be shewn.¹

Ground of
decision in
Fletcher v.
Rylands
considered.

As to the latter class, *Fletcher v. Rylands*² is commonly said to decide that negligence is *not* necessary to found the action. Analyzing this expression, it will be found that it is not a perfectly accurate expression of the exact decision in that case. Granted that the agency in *Fletcher v. Rylands*—the water—causing the injury is rightfully where it is, there is no negligence in the subsequent stages of its development into an injurious agency. The wrong—the violation of duty—is bringing it where, though without negligence in any of its subsequent stages, it is set on a course that produces injurious consequences. The possession of it implies a duty for its retention; if injurious consequences did not follow from the collection of water on land, the bringing it there would be perfectly free from blame. It is not the bringing it, but the bringing it to a place not, perhaps, antecedently known to be unfit, but which subsequently proves unfit for its reception, and whence, negligence apart, and purely through the development of the ordinary processes of nature, it escapes, and does damage. In *Fletcher v. Rylands*, had geological investigations been made, the character of the strata would have appeared. Had the character of the strata appeared, and had the defendant still brought his water there, there would have been actual negligence. If the law did not impose a duty on the landowner to make investigations before bringing on his land that which is liable, in the ordinary sequence of natural operations, to escape and cause injury, it arrives at the same conclusion by rendering him liable when, by undiscovered, but natural, agencies his water flows on his neighbour's land. In the

¹ *Williams v. East India Company*, 3 East, 192; *Brass v. Maitland*, 6 E. & B. 470; *Farrant v. Barnes*, 11 C. B. N. S. 553; *Hutchinson v. Guion*, 5 C. B. N. S. 149.

² L. R. 1 Ex. 265.

ordinary course of things he would be safe if he took things as they appeared. In this case he is bound to search for latent defects; and though, from the starting-point that a man has an undoubted right to have a thing on his land, there is no negligence traceable, if we take for our starting-point the position that he is not to bring anything on his land that may escape to his neighbour's by the operation of natural agencies, then, in not placing the mobile agency so that it cannot escape through the operation of natural agencies, he is guilty of negligence; but in a prior stage to that where it is usually sought for—not in the setting it in motion, but in the placing it where it may be set in motion.

That this is the nature of his obligation appears from *Nichols v. Marsland*. "A defendant," says Mellish, L.J.,¹ "cannot, in our opinion, be properly said to have caused or allowed the water to escape if the act of God or the Queen's enemies was the real cause of its escaping, without any fault on the part of the defendant." That is, "she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature which she could not anticipate."²

Rylands v. Fletcher considered in its relation to *Nichols v. Marsland*.

But if extraordinary natural forces do not bring liability in their train, it only remains to guard against the ordinary course of nature, which can be anticipated, and the intervention of a third person (of which presently). The defendant's liability, accordingly, is attributable to his introduction on his land of something that, through the operation of natural and ordinary forces, will become injurious to others. Whether this something is a "dangerous agency" or a perfectly innocent one, in either case the liability arises, and arises, not by reason of danger, but of unauthorized intrusion. The danger may increase the injury when it is once operative, but it has no effect on the right of action.

Does, then, a dangerous agency imply any greater duty than the duty that arises to prevent intrusion in any natural event? In so far as a dangerous agency is the subject of a special rule, it is subject to the rule that the greatest possible care and caution must be used. This, by hypothesis, has been used, and, in so far as it is included within the wider rule binding a landowner to retain what he brings on his land from transgressing on his neighbour's it is subject to the additional safeguard that all precautions that accustomed prevision would suggest should be used.

The distinction between the law relating to "dangerous agen-

Carter v. Towne.

¹ 2 Ex. D. 1, at 5.

² *L. c.* at 6.

cies" and the wider law that regulates the non-interference with another's rights is illustrated by the American case of *Carter v. Towne*.¹ Defendant was licensed to sell gunpowder, and sold some to a child eight years old, who injured himself by exploding it. An action being brought on its behalf, the defendant pleaded he was a licensed seller of gunpowder. This was held no defence, as in selling to the child he had been guilty of negligence. Here the defendant's liability was determined by negligence or the absence of it. In the case we are considering, had he been guilty of no negligence, his liability would never have arisen. The dangerous character of the article he sold was important as affecting him with greater responsibility for care; but assuming that he used the amount of care needful in dealing with a dangerous article, the injury which arose after it had left his hands could not in law be imputed to him.

If the article were one that the defendant was bound to keep on his land or under his control, whether the article were dangerous or not could make no difference.

Had an explosion taken place injuring adjacent properties, as soon as it was shewn that the result was from something brought on his land, an altogether different inquiry would be instituted. It would then be presumed that the defendant was liable, because, irrespective of the danger or innocency of the article on his land, he ought to have kept it there. No negligence need be proved; neither would it avail to shew that the extremest care had been exercised from the time of the placing of the explosive material where it exploded. The liability would arise from the placing it where it was not able to be contained, and the only evasion of responsibility would be by bringing the case within the exceptions in *Nichols v. Marsland*. Eliminating the duty to keep the explosive on one's own land, and leaving only the fact of possession of an extremely dangerous article, liability ends so soon as adequate care is shewn to have been exercised. Take, then, *Bramwell, B.'s chained tiger*: if the keeping him is lawful (and probably, on argument, it would be found that the keeping of tigers, as of wolves formerly, is not lawful, and the difficulty would be evaded²), and lightning breaks his chain, it is difficult to see why he should be an exception from the rule of law as laid down by *Mellish, L.J.*, that "when the law creates a duty and the party is disabled from performing it, without any default of his own, by the act of God or the King's enemies, the law will excuse him." If not, is a distinction to be made between the act

¹ 98 Mass. 567.

² See per *Ld. Raymond, C.J.*, *Rex v. Huggins*, 2 *Ld. Raym.* 1574, at 1583.

of God or the King's enemies? And, if a distinction be made, in the event of an invasion, would the Zoological Society be liable if the savage beasts in their gardens were turned loose in the streets by the enemy?¹

Bramwell, B., also excludes the case of mischief done by a third person.² "It is not," says he, "the defendant who let loose the water and sent it to destroy the bridges. She did indeed store it, and store it in such quantities that, if it was let loose, it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then, if a mischievous boy bored a hole in a cistern in any London house and the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be." If, however, the liability is wholly independent of negligence, that is what not only would be, but what ought to be. Of two people, the one injured, who has the misfortune to be in the neighbourhood where water escapes without negligence of the proprietor, and the proprietor who brings it whence it escapes by the wrongful act of the mischievous boy, the position of the innocent sufferer seems distinctly better, and well within that view of *Rylands v. Fletcher*³ which regards it as deciding that a landowner who brings anything on his land is bound, as against his neighbours, at all hazards to prevent it trespassing upon their property.

Probably this view of *Rylands v. Fletcher* is too broad a one, and the decision extends only so far as is necessary to make a defendant liable for the escape of anything brought on land, which in its natural condition was not in or upon it, but which, in consequence of being so brought—that is, in consequence of the condition of the land, or in consequence of any imperfection in the mode of bringing it—in other words, by negligence—comes to escape and to injure neighbours.⁴ The latter of these kinds is no more than the ordinary case of liability—want of due care in dealing with a thing. Yet the former is still negligence, if negligence of a more special class. There is, indeed, a right to put what one likes on one's land, but there is a duty to see that one's land will certainly contain what is placed there; not a mere duty to take all care when a thing is placed there, and with reference to the existing conditions; but a duty to insure

¹ See, as to this, *post*, 606.

² *Nichols v. Marsland*, L. R. 10 Ex. 255, at 259.

³ L. R. 3 H. L. 330; L. R. 1 Ex. 265.

⁴ See per Lord Cairns, L. R. 3 H. L. 330, at 339. In *M'Cafferty v. Spuyten Duyvil and Port Morris Railway Company*, 61 N. Y. 178, at 185, Dwight, C., dissenting from the rest of the Court, argues that the principle of *Rylands v. Fletcher* renders a landowner liable for an explosion caused by the negligence of the contractor. All the authorities bearing on this wide view will there be found set out and examined. *Colton v. Onderdonk*, 58 Am. R. 556.

that those conditions are adequate to safeguard the thing introduced ; and escape from any cause that cannot be said to have been "caused or allowed" by the defendant brings no liability. Cases there may be, though probably very infrequently found, where the escape is from a natural cause subsequently apparent, but antecedently not to be discovered. In cases of this sort under *Rylands v. Fletcher* there would be liability. If, on the other hand, the right is only to bring things on land where there is an absolute safeguard against their escape, bringing them there without the absolute safeguard is a "want of care and caution according to the circumstances."

Chalmers v.
Dixon.

This is the view taken by the Court of Session of the decision in *Rylands v. Fletcher* in *Chalmers v. Dixon*,¹ where the Lord Justice-Clerk neatly states the matter thus: "I think that *culpa* does lie at the root of the matter. If a man puts upon his land a new combination of materials, which he knows, or ought to know, are of a dangerous nature, then either due care will prevent injury, in which case he is liable, if injury occurs, for not taking that due care, or else no precautions will prevent injury, in which case he is liable for his original act in placing the materials upon the ground." So limited, the act of the mischievous boy—an independent volition—is excluded ; not so limited, it is difficult to see why the person, who brings the thing where it causes injury, escapes from liability for not keeping that on his land, which it was in his option not to have brought there at all, quite irrespectively of whether the immediate cause of the escape is the act of God or anything else which is incapable of forecast or control ; but if the not taking sufficient heed to the operation of the laws of nature is ground for an action when damage supervenes, a species of negligence must in all cases be found antecedently to the right arising.

Box v. Jubb.

*Box v. Jubb*² countenances this latter view. By reason of the act of a person above the defendants' land co-operating with the act of a person below the defendants' land, a reservoir on defendants' land overflowed and caused injury to a neighbouring proprietor. The Court of Exchequer held the defendants not liable ; since the cause of the injury was *vis major*—"the unlawful act of a stranger"—which "the defendants could not possibly have been expected to anticipate," and "the law does not require them to construct their reservoir and the sluices and gates leading to it to meet any amount of pressure which the wrongful act of a third person may impose." That being so, the obligation is not to

¹ 3 Rottie, 461, at 464. Holmes, *The Common Law*, 157, takes the same view.

² 4 Ex. D. 76.

keep what is brought on land at all hazards as has sometimes been stated, but no more than to insure against the operation of natural laws causing injury in those cases where negligence in the management of the injurious agency is not alleged; and in all cases to see that the dealings with the injurious agency are in all their stages free from negligence.

IV. Where the damage is the consequence of an accumulation for public purposes under the express authority of a statute.

IV. Damage done under statutory authority.

This principle has already been considered.¹ It is sufficient, therefore, here merely to reproduce the statement of it by Blackburn, J., in advising the House of Lords in *Hammersmith Railway Company v. Brand*.² "It is agreed on all hands that if the Legislature authorizes the doing of an act (which if unauthorized would be a wrong and a cause of action) no action can be maintained for that act, on the plain ground that no Court can treat that as a wrong which the Legislature has authorized, and consequently the person who has sustained a loss by the doing of that act is without remedy, unless in so far as the Legislature has thought it proper to provide for compensation to him. He is, in fact, in the same position as the person supposed to have suffered from the noisy traffic on a new highway is at common law, and subject to the same hardship. He suffers a private loss for the public benefit."

We are now brought to the consideration of a class of cases that may be looked on as asserting a principle different from that in *Rylands v. Fletcher*, and not merely an exception to the universality of what was there laid down. *Rylands v. Fletcher* was the case of water brought on premises for the use of the person so bringing it, whence it escaped to other premises. In the cases we are now to consider, water is brought on premises by a right paramount to that of the person injured by it.

Water brought on premises by right paramount to that of the person injured by it.

*Carstairs v. Taylor*³ is the earliest of these. The plaintiffs were tenants of the defendant of the ground floor of a warehouse, the upper floors of which were occupied by the defendant. The water from the roof was collected by gutters into a box, from which it was discharged into the drains. A rat made a hole in the box, and water thereby entered the warehouse, and damaged plaintiffs' goods. The box and gutters had been properly

Carstairs v. Taylor.

¹ *Ante*, 348.

² L. R. 4 H. L. 171, at 196. Cp. *Cattle v. Stockton Waterworks*, L. R. 10 Q. B. 453; *Dunn v. Birmingham Canal Company*, L. R. 7 Q. B. 244, L. R. 8 Q. B. 42; *Madras Railway Company v. The Zamindar of Carvatenagarum*, L. R. 1 Ind. App. 364, 30 L. T. (N.S.) 770.

³ L. R. 6 Ex. 217.

examined by the defendant, and there was no negligence. The case was argued both as a question of contract and of a duty at law. To the former view, it was answered that "one who takes a floor in a house must be held to take the premises as they are, and cannot complain that the house was not constructed differently."¹ To the latter, that "the accident was due to *vis major* as much as if a thief had broken the hole in attempting to enter the house, or a flash of lightning or a hurricane had caused the rent;"² that "the roof was the common protection of both, and the collection of the water running from it was also for their joint benefit;" and that "the plaintiffs must be taken to have consented to this collection of the water, which was for their own benefit, and the defendant can only be liable if he was guilty of negligence."³ The decision of the principle involved in *Carstairs v. Taylor* was therefore somewhat obscured by the fact that the case could be explained on the ground taken by the Lord Chief Baron of *vis major*; and also because the apparatus for conducting the water was there as much for the benefit of the plaintiff as of the defendant.

Ross v.
Fedden.

In *Ross v. Fedden*⁴ both these elements were eliminated. Plaintiff occupied the ground floor of a house, of which the defendant occupied the second floor, where was a water-closet to which the defendant alone had access. The valve of the supply-pipe having got out of order, and the waste-pipe being stopped, an overflow was caused, which damaged the portion of the premises occupied by the plaintiff. There was no negligence. *Carstairs v. Taylor* was sought to be discriminated, because there was no *vis major* and no common interest. The Court of Queen's Bench, however, held that the plaintiff could not recover, and approved the reasoning of the county court judge,⁵ who said: "I think that in the words of Martin, B., in the case already referred to,⁶ 'one who takes a floor of a house must be held to take the premises as they are.' As far as he is concerned, I think the state of things then existing may be treated as the natural state

¹ Per Martin, B., L. R. 6 Ex., at 222.

² Per Kelly, C. B., L. R. 6 Ex., at 221.

³ Per Bramwell, B., L. R. 6 Ex., at 222.

⁴ L. R. 7 Q. B. 661.

⁵ "The subject is very well argued out, and I was prepared to agree with it as soon as I heard it read," per Blackburn, J., L. R. 7 Q. B., at 665.

⁶ *Carstairs v. Taylor*, L. R. 6 Ex. 217, at 222. In *Humphries v. Cousins*, 2 C. P. D. 239; *Ross v. Fedden*, and *Carstairs v. Taylor*, are distinguished. Cp. *Weston v. Incorporation of Tailors of Potterow*, 1 Dunlop, 1218, where the judgment of Lord Medwyn, at 1223, should be looked at. Through defective plumbing work the stock in a shop was injured by an overflow of water from premises above; it having been clearly proved that the cause of the overflow was an insecurely closed pipe, the plumber was held liable, though four years had elapsed since the time of doing the work, for all expenses to which his employer had been put, *M'Intyre v. Gallacher* (1883), 11 Rettie, 64.

of things and the flow of water through cisterns and pipes then in operation as equivalent to the natural flow of water; I think he takes subject to the ordinary risks arising from the use of the rest of the house as it stands; and that one who merely continues to use the rest of the house as it stands, and in the ordinary manner, does not fall within the rule laid down in *Rylands v. Fletcher*,¹ and in the absence of negligence is not liable for the consequences."

*Anderson v. Oppenheimer*² was similar to *Carstairs v. Taylor* *Anderson v. Oppenheimer.* (which, however, was not cited in it), and was brought for breach of a covenant for quiet enjoyment. The Court of Appeal was of opinion that, the water being brought on premises for the common benefit of the tenants, no action lay. The principle we are now considering may therefore be regarded as exonerating from liability on the ground indicated by Blackburn, J., in *Fletcher v. Rylands*³ that the injured person has placed himself in the position in which he sustains injury in such circumstances as shew that he has taken the risk upon himself; and this either by partaking of a common benefit, subject to a common liability to damage as in *Carstairs v. Taylor*,⁴ or by taking an interest with a liability to damage incident to it, as in *Ross v. Fedden*.⁵ In either case his position is determined by the contract into which he enters. The same principle may be applied with regard to ordinary water supply to a house or row of houses. The water company supplies water under its statutory powers, and so is not liable for injury caused by the escape of water apart from negligence.⁶ Moreover, the occupier has no choice but to receive the water whether he likes it or not.⁷ The receiver's liability ought not therefore to be greater than the supplier's. The water supply system is constructed on the principle of communicating a common benefit and thus liability in respect of the escape of water becomes dependent upon negligence and is not within the principle enunciated in *Fletcher v. Rylands*.

¹ L. R. 3 H. L. 330.

² 5 Q. B. Div. 602; *Harrison, Ainslie, & Company v. Muncaster* (1891), 2 Q. B. 680, was an action for breach of a covenant of quiet enjoyment; the working of the plaintiff's mine being interrupted by a flow of water from another mine leased by the defendant, which was caused by those working the other mine having "pecked" the rock in the ordinary course of their working, and produced the inrush of water without negligence by striking on a "feeder," whose existence was unsuspected. The Court of Appeal held that this not having been directly caused, and not having been foreseen, or being an event, ought to have been foreseen at the time the covenant was entered into, was not a violation of the covenant.

³ L. R. 1 Ex. 265, at 287.

⁴ L. R. 6 Ex. 217.

⁵ L. R. 7 Q. B. 661; *Stevens v. Woodward*, 6 Q. B. D. 318, which turns rather on scope of authority; *Ruddeman v. Smith*, 5 Times L. R. 417.

⁶ See *ante*, 348, 365.

⁷ *E.g.*, see The Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 37, 48.

II. WATER COMING UPON LAND.

Two heads :

I. Water in a defined channel.

II. Water not in defined channels.

This we proceed to consider under the headings of—

I. The position of the owners of land by or through which water runs in a defined channel ; and

II. The position of the owners of land by or through which water runs not in any defined channel.

The rule of the civil law is: *Sic enim debere quem meliorem agrum suum facere, ne vicini deteriore faciat.*¹This is followed by the Code Civil,² which, with its comments, is declared by the Privy Council, in *Miner v. Gilmour*, not to differ materially from the law of England.³I. Water in a defined channel.
Definition of a watercourse.

I. The position of the owners of land by or through which water runs in a defined channel.

To be a watercourse, by force of the term, water must flow in a defined stream. It need not always flow ; but there must be a stream *usually* flowing in a particular direction. Sometimes it may even be dry ; still usually it must flow in a definite channel, having a bed, sides, or banks, and most frequently discharging itself into some other stream or body of water. A mere surface-drainage over the entire face of a tract of land made up of unusual freshets or other extraordinary causes, is not a watercourse ; neither is water flowing in the hollows or ravines in land, which is the mere surface-water from rain or melting snow, and is discharged through hollows or ravines, at other times destitute of water, from a higher to a lower level.⁴Watercourse
(a) natural ;
(b) artificial.

Water running in a defined stream within the foregoing description may be either natural or artificial.

A natural stream is one which takes its rise from causes produced by the operations of nature, and has the inherent force to flow in a channel either marked out by the configuration of the soil or directed by the force of the stream itself. An artificial stream is one that arises by the agency of man, or, though arising from natural causes, flows in a channel made by man.⁵¹ D. 39, 3, 1, § 4 ; and see judgment of Lord Denman, C.J., *Mason v. Hill*, 5 B. & Ad. 1, where the Roman law is much considered, at 23-24. ² Arts. 640-644.³ *Miner v. Gilmour*, 12 Moo. P. C. C. 131, at 156 ; Commissioners of French Hoek v. Hugo, 10 App. Cas. 336, at 334 ; see, too, per Pollock, C.B., *Wood v. Waud*, 3 Ex. 748, at 781 ; see, too, as to the conformity of the English rules of law on this subject with the rules of general jurisprudence, 3 Kent, Comm. 439, 440, set out at length in Parke, B.'s, judgment in *Embrey v. Owen*, 6 Ex. 353, at 369 ; also *Tyler v. Wilkinson*, 4 Mason (U.S.) 397, and *North Shore Railway Company v. Pion*, 14 App. Cas. 612. Unreasonable use of water is considered in *Ellis v. Clemens*, 21 Ont. R. 227, *affd.* 22 Ont. R. 216.⁴ Per Dixon, C.J., *Hoyt v. Hudson*, 27 Wis. 656, cited by Wharton, *Negligence*, 2nd ed. But see § 935, n.⁵ Goddard, *Law of Easements* (4th ed.), 70. As to a natural watercourse, see *Gregory v. Bush*, 8 Am. St. R. 797 ; Rankine, *Land-Ownership in Scotland*, 406, 412 ; a work that may with advantage be referred to on the whole of this subject.

Holker *v.* Porritt¹ is important as shewing what considerations govern in determining what is a natural stream. A stream upon a man's land was in some way or other divided, one portion of it flowing in a defined current, while another passed into a farmyard, where it supplied a trough, and the overflow from the trough was diffused over the ground. The owner of the farmyard collected the overflow into a reservoir, and used the water so collected for the purposes of a mill. A riparian proprietor higher up obstructed the flow on the ground that the water so collected was an artificial stream, whereupon the owner of the farmyard sued; and the Court of Exchequer held that he was entitled to maintain his action on the ground that the stream was a natural stream, and remained a natural stream though it had been turned into an artificial channel. In the Exchequer Chamber² the judgment went on a somewhat broader principle—that as the water came to the plaintiff's land, it became his to do what he liked with; and he had a right to complain of any one diminishing the flow which *came to him* as a natural stream; that, no doubt, the consequences to a wrongdoer were more serious by reason of the more profitable use the water was put to; but the authorities established that so soon as the owner of land on a stream has appropriated the water to a beneficial use, he may sue in respect of damage done to him with reference to it.³

Holker *v.*
Porritt.

In the Court of Exchequer, Martin, B., said: "Now, that state of things [*i.e.*, as shewn in the case] was exactly as if a stream lost itself in a marsh or swamp, a haunt for snipe and wild-fowl, but not turned to any agricultural purpose. And I am of opinion that, if a proprietor in such a case expends his labour in cutting a course for the water, he acquires a right analogous to that which he would have if that course had been a natural stream, and that no distinction can be made between a natural stream and a watercourse made to drain land and to carry down the water to its natural destination."

Martin, B.'s,
judgment in
the Court of
Exchequer.

The test, then, to determine between a natural and an artificial stream is, not the construction of the channel along which it flows, but the consideration of the circumstances of its course—does it flow naturally at all, not is its volume in all circumstances the same. A stream arising from natural causes, and flowing in its natural course, continues a natural stream, though it flows in a channel altogether transformed by the hand of man.

Test to
determine
between a
natural and
an artificial
stream.

The only relevant questions, then, are—In what condition is

¹ L. R. 8 Ex. 107, L. R. 10 Ex. 59. The case is called Holker *v.* Porritt in L. R. 8 Ex. and Holker *v.* Porritt in the Ex. Ch.

² L. R. 10 Ex. 59.

³ Mason *v.* Hill, 5 B. & Ad. 1.

the water received on a man's land, and, if bound to part with it, in what condition does it leave his land? While upon his land he may divert it into channels or make what use of it he pleases without in any way being accountable for such use, provided only it leaves his land in the same condition as that in which he received it, and in undiminished volume, save so far as is consistent with his right to a reasonable user of it for domestic or similar purposes.¹ If the stream originated by the agency of man, then an inquiry must be instituted whether rights have been acquired to the use of the stream, which, though originally artificial, may have become affected with the rights and duties attaching to natural streams.²

Natural stream either (a) navigable; or (b) not navigable.

A natural stream is either navigable or not navigable.

A navigable stream is one over which the public has a right of navigation,³ which is identical with a right of way over a land highway.⁴

In navigable rivers that are tidal the soil, as high as the sea flows or reflows, is presumed⁵ to belong to the King, and the King is presumed to have the same property therein as in the foreshore of the sea.⁶ In navigable rivers beyond the flow of the tide the proprietors on either side are presumed to be possessed of the soil of it to a supposed line in the middle; though the law secures to the community the right of navigation upon the surface of the water as a public highway, which individuals are forbidden to obstruct, and precludes the riparian proprietors from preventing the progress of the fish through the river or dealing with the water to the injury of their neighbours.⁷ The right of navigation does not draw with it any

¹ *Roberts v. Richards*, 50 L. J. Ch. 297 (*Sutcliffe v. Booth*, 32 L. J. Q. B. 136, considered and approved), but in the Court of Appeal the order was discharged on an undertaking being given by the defendant not to divert any water from the water-course, 51 L. J. Ch. 944. *Attorney-General v. Great Eastern Railway Company*, L. R. 6 Ch. 572.

² *Ivimey v. Stocker*, L. R. 1 Ch. 396. As to what constitutes navigability, *Earl of Ilchester v. Raishleigh*, 61 L. T. 477, at 479.

³ *Original Hartlepool Collieries Company v. Gibb*, 5 Ch. D. 713; *Anon.*, 1 Camp. 517, n.; *The King v. Mountague*, 4 B. & C. 598; *Earl of Ilchester v. Raishleigh*, 61 L. T. 477; even against the Crown, *Colchester, Mayor, &c., of, v. Brooke*, 7 Q. B. 339; *Williams v. Wilcox*, 8 A. & E. 314.

⁴ *Orr Ewing v. Colquhoun*, 2 App. Cas. 839.

⁵ *Att.-Gen. v. Emerson*, (1891) App. Cas. 649.

⁶ *Com. Dig. Navigation (A)*; *Bulstrode v. Hall*, 1 Sid. 148.

⁷ Per O'Hagan, J., in *Murphy v. Ryan*, Ir. R. 2 C. L. 143, at 148, citing Hale, *De Jure Maris*, i.; *Bristow v. Cormican*, 3 App. Cas. 641, at 666: followed in *Hardin v. Jordan*, 140 U.S. (33 Davis) 371, where the whole subject is elaborately treated, and where, speaking of *Bristow v. Cormican*, the Court says, at 392: "Of course this decision has not the controlling authority which it would have had if it had been made before our revolution. But it is the judicial decision of the highest authority in the British Empire, and is entitled to the greatest consideration on a question like this of pure common law." *Kaukauna Company v. Green Bay, &c. Canal Company*, 142 U.S. (35 Davis) 254; *Lembeck v. Nye*, 21 Am. St. R. 828; *Shively v. Bowlby*, 152 U.S. (45 Davis) 1. There can be no public right of fishing in non-tidal waters, even where they are to some extent navigable rivers; *Pearce v. Scotcher*, 9 Q. B. D. 162.

right of property, but is confined to the right of passage to and fro, as in a land highway ;¹ so that, in addition to the right connected with the navigation to which he is entitled as one of the public, the riparian owner on a navigable river retains his rights as an ordinary riparian owner, subject only to the public right of navigation.²

The contention that where navigation is difficult the public are entitled at common law to tow on the banks of ancient navigable rivers cannot be supported.³ In *Winch v. Conservators of the Thames*,⁴ however, it was said that there is no objection to a dedication of a way to the public for such a limited purpose. "Perhaps," says Lord Kenyon, in an earlier case,⁵ "small evidence of usage before a jury would establish a right by custom on the ground of public convenience"; and from the tone of the latter case this seems to be so.

With these limitations, the position of an owner of land by which a navigable stream flows is the same as that of an owner by whose land a not navigable stream flows. If the stream form the boundary of the property of landowners, each proprietor has an equal right to the use of the water, and no proprietor has a right to the water to the prejudice of other proprietors unless he has a right to divert it or a title to some exclusive enjoyment.⁶

The owners of lands adjoining a stream from its source to the sea have a natural right to the use of the water of it. A river begins at its source so soon as it comes to the surface, but the owner of the land on which it rises cannot monopolize all the water at the source any more than a proprietor lower down.⁷ When it is said that the proprietors of the bank of a running stream are entitled to the bed of the stream as their property *usque ad medium filum*, it does not follow that their property is capable of being used in the ordinary way in which so much land uncovered by water might be used. The bed of the stream must only be used in such a way as not to affect the interest of riparian proprietors in the stream. Neither is allowed to use it in such a manner as to interfere with the natural flow. The

¹ *Orr Ewing v. Colquhoun*, 2 App. Cas. 839. Persons using a navigable highway no more acquire thereby a right to fish there than persons passing along a public highway on land acquire a right to shoot upon it; *Smith v. Andrews* (1891), 2 Ch. 678, at 696.

² *Lyon v. Fishmongers' Company*, 1 App. Cas. 662; *North Shore Railway Company v. Pion*, 14 App. Cas. 612.

³ *Ball v. Herbert*, 3 T. R. 253.

⁴ L. R. 7 C. P. 458, at 471.

⁵ In *Ball v. Herbert*, 3 T. R. 253, at 262.

⁶ *Wright v. Howard*, 1 Sim. & St. 190; 3 Kent. Comm. 439.

⁷ *Dudden v. Guardians of Clutton Union*, 1 H. & N. 627.

bank may be fenced, though any erection in the *alveus* is unlawful; and the *onus* of proving that such an erection is not an encroachment falls on the person putting it in the stream. Neither need damage be proved¹—that is, damage need not be proved if the Court be of opinion that injury may reasonably be expected to result from an encroachment. If injury does not result at the time of action, and there is no probability of it resulting at some future time, then no action lies.²

Further, each riparian proprietor is presumed to be entitled to the adjoining half of the bed of the stream. This presumption is, however, rebuttable; but not by proof that the conveyance is of land bounded by the river, nor of subsequent inconvenience arising to the grantor from the grant, nor that the grantor was owner of both banks.³

If the stream is wholly in the property of one landowner, then the rights of those higher up and lower down the course of the stream are the same as those of opposite proprietors, with the exception that any use may be made of the stream within the limits of property, provided that its volume and quality are unaffected at the points of adit and exit.⁴

Embrey v.
Owen.

The law is stated in *Embrey v. Owen*⁵ to be that flowing water is *publici juris* in this sense only—that all may use it reasonably who have a right of access to it, and that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession; and that during the time of his possession only. The right to have a stream of water flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; this is not an absolute and exclusive right to the flow of *all* the water; it is subject to the right of other riparian proprietors to a reasonable enjoyment of it; and consequently it is only for an unreasonable

¹ *Bickett v. Morris*, L. R. 1 H. L. (Sc.) 47. This case, as explained by *Orr Ewing v. Colquhoun*, 2 App. Cas. 839, is discussed, *Belfast Ropeworks Company v. Boyd*, 21 L. R. Ir. 560, the case of the erection of a weir to establish control over water. See *Earl of Norbury v. Kitchin*, before Wood, V.C., 15 L. T. (N.S.) 501; *Ross v. Powrie and Pitcaithley*, 19 Rettie 314; *Crossley v. Lightowler*, L. R. 2 Ch. 478. A riparian owner may moor to his bank a floating wharf and boat-house if the same is not an obstruction to the navigation, *Booth v. Ratté*, 15 App. Cas. 188.

² Per Cotton, L.J., *Kensit v. Great Eastern Railway Company*, 27 Ch. Div. 122, at 131; *Swindon Waterworks Company v. Wilts and Berks Canal Navigation Company*, L. R. 7 H. L. 697.

³ *Micklethwait v. Newlay Bridge Company*, 33 Ch. D. 133; *Jameson v. Police Commissioners of Dundee*, 12 Rettie 300; *Duke of Devonshire v. Pattinson*, 20 Q. B. D. 263.

⁴ *West Cumberland Iron and Steel Company v. Kenyon*, 11 Ch. Div. 782; *Canfield v. Andrews*, 41 Am. R. 828.

⁵ 6 Ex. 353; *Withers v. Purchase*, 60 L. T. 819.

and unauthorized use of this common benefit that any action will lie.¹

The general type of these uses is specified by Lord Cairns, C., in *Swindon Waterworks Company v. Wilts and Berks Canal Navigation Company*:² “Undoubtedly the lower riparian proprietor is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water, that is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said, *ad lavandum et ad potandum*, whatever portion of the water may be thereby exhausted and may cease to come down by reason of that use. But, farther, there are uses no doubt to which the water may be put by the upper owner, namely, uses connected with the tenement of that upper owner. Under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purposes of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner, and the water may be restored after the object of irrigation is answered, in a volume substantially equal to that in which it passed before. Again, it may well be that there may be a use of the water by the upper owner for, I will say, manufacturing purposes so reasonable that no just complaint can be made upon the subject by the lower owner. Whether such a use in any particular case could be made for manufacturing purposes connected with the upper tenement would, I apprehend, depend upon whether the use was a reasonable use. Whether it was a reasonable use would depend, at all events in some degree, on the magnitude of the stream from which the deduction was made for this purpose over and above the ordinary use of the water.”

In connection with this may be taken an often-cited passage from the judgment of Lord Kingsdown in *Miner v. Gilmour*:³ “By the general law applicable to running streams every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what

¹ *Sampson v. Hoddinott*, 1 C. B. N. S. 590. As to diverting a watercourse, see *Gilson v. Delaware and Hudson Canal Company*, 36 Am. St. R. 802, and the exhaustive note on “Proximate and Remote Cause,” 807-861.

² L. R. 7 H. L. 697, at 704; *Bonner v. Great Western Railway Company*, 24 Ch. D. 1.

³ 12 Moo. P. C. C. 131, at 156; *Duke of Buccleuch v. Cowan*, 5 Macph. 214; cited *Commissioners of French Hoek v. Hugo*, 10 App. Cas. 336, at 370; cited *North Shore Railway Company v. Pion*, 14 App. Cas. 612, at 619.

may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition, he may dam up the stream for the purposes of a mill, or divert the water for the purposes of irrigation. But, he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."

Distinction
between
ordinary and
extraordinary
user.

A distinction is here drawn between—

First, ordinary user to which water may be applied irrespective of any question of subtracting from lower proprietors;¹ and,

Secondly, extraordinary user to which it may be applied subject to its not being subtracted from them; and this is settled law.

Ormerod v.
Todmorden
Mill Com-
pany.

In *Ormerod v. Todmorden Mill Company*,² the remark thrown out during the argument by Brett, M.R., may seem, if not to suggest, at any rate to transmit, a doubt as to the perfect accuracy of Lord Kingsdown's statement of the rights of ordinary user. Alluding to *Swindon Waterworks Company v. Wilts and Berks Canal Navigation Company*,³ he says: "In that case Lord Cairns in substance adopts the language of Lord Kingsdown in *Miner v. Gilmour*;⁴ but I observe that in *Lord Norbury v. Kitchen*⁵ the remarks of Lord Kingsdown were not fully assented to by the Court of Exchequer." In that case, Pollock, C.B., delivering the judgment of himself and Channell, B., disclaimed conceding that, even if Martin, B., read with approbation a passage from Lord Kingsdown's judgment which was not correct, there should of necessity be a new trial, since such a conclusion is by no means a consequence. And Wilde, B., explains what was meant by saying: "It is stated that the passage which was so quoted was bad law; that as the learned judge quoted it to the jury, and expressed his opinion that it was good law, that necessarily must be misdirection. I do not propose to offer any opinion as to whether it is good or bad law, because I do not think that question arises." And Martin, B., adds: "Although probably Lord Kingsdown, in expressing the opinion

¹ See *Pennington v. Brinsop Hall Company*, 5 Ch. D. 769, per Fry, J., at 772: "The pollution of a clear stream is to a riparian proprietor below both injury and damage, whilst the pollution of a stream already made foul and useless by other pollutions is an injury without damage." Increased fouling of a stream already made foul is not permitted. *M'Gavin v. M'Intyre*, 17 Rettie 818; or, in the words of Lord Watson in the same case in the House of Lords (1893), App. Cas. 268, at 277: "A proprietor who has prescribed a right to pollute cannot in my opinion use even his common law rights in such a way as to add to pollution."

² 11 Q. B. Div. 155, at 165.

³ 5 L. R. 7 H. L. 697, at 704.

⁴ 12 Moo. P. C. C. 131, at 156.

⁵ 7 L. T. (N.S.) 685; at *Nisi Prius*, 3 F. & F. 292.

of the Privy Council (as to the right of the upper riparian owner) is right, yet I think that would be a matter that ought to be put on the record, and decided in the most solemn manner; but it has no more to do with this case than it has to do with any other matter that may occur in the next case, which may be about a bill of exchange."

In the subsequent case of *Nuttall v. Bracewell*,¹ where the matter was decided by a superior Court in considered judgments, Martin, B., said: "The law has been supposed to be well settled, and, in my opinion, is nowhere more clearly stated than by Lord Kingsdown in *Miner v. Gilmour*"; after reading the passage already cited, the learned judge continued: "According to the law so enunciated, and which no doubt is the law," &c. While Channell, B., delivering the judgment of himself and Pollock, C.B., two of the judges in *Earl of Norbury v. Kitchin*, says:² "I quite agree that the passage quoted by my brother Martin from Lord Kingsdown's judgment in *Miner v. Gilmour*³ very clearly, as well as accurately, states the law applicable to running streams. I think, however, that the decision in *Stockport Waterworks Company v. Potter*⁴ was quite in accordance with the law as so stated; and, further, if the decision in the *Stockport Waterworks* case was wrong, then it appears to me that Lord Kingsdown's statement would require qualification." Now Brett, M.R., in *Ormerod v. Todmorden Mill Company*, says:⁵ "I agree with the judgment of the majority of the Court in *Stockport Waterworks Company v. Potter*;"⁶ and the other judges of the Court did the same.

In the *Law Journal* report of *Ormerod v. Todmorden Joint Stock Mill Company*,⁷ Brett, M.R., is reported to say in the course of his judgment: "If I were clear that the use of the water by the defendants was an extraordinary use within the principle laid down by Lord Kingsdown, I might be able to deal with the case on that footing; but the argument for the defendants strikes me as forcible, and I agree that it is impossible to negative the proposition that a use that may at one time have been extraordinary, may by changes in the condition of things become ordinary, and that a use of water which might be extraordinary in an agricultural district may not be extraordinary

¹ L. R. 2 Ex. 1, at 9.

² L. R. 2 Ex. 1, at 13.

³ 12 Moo. P. C. C. 131, at 156.

⁴ 3 H. & C. 300. ⁵ 11 Q. B. Div. 155, at 170.

⁶ 3 H. & C. 300. Cp. *Laing v. Whaley*, 3 H. & N. 675, 901, which decided that no one other than those in lawful enjoyment of a beneficial flow of clear water from a stream can maintain an action for the fouling it.

⁷ 52 L. J. Q. B. 445, at 450.

in a manufacturing district ; and I am not prepared to hold that in such a district, where the use of water for the purpose of drinking or irrigation has become obsolete, the use of water for manufacturing purposes may not be an ordinary user."

Stockport
Waterworks
Company v.
Potter.

In the case just referred to—*Stockport Waterworks Company v. Potter*¹—the point in dispute was whether the grantee from a riparian proprietor of land part of the former riparian estate, but separated from the stream by land of the grantor not included in the grant, with a grant from the grantor of a right to lay pipes from the stream to the granted land, and to take water by means of them from the stream to such granted land, could maintain an action against a person who fouled the stream. The Court of Exchequer were divided on the question. Bramwell, B., was of opinion that the grantee could maintain a right of action ; because the grant, as between grantor and grantee, being good, is evidence that they have found the arrangement to their advantage, and consequently to the public good. The grant ought therefore be made effectual against a person who, as against the riparian proprietor, was a wrongdoer ; while as the riparian proprietor might sue in his own name for injury, and might covenant that the grantee should sue in his name, what could be done indirectly should be able to be done directly.

Bramwell,
B.'s, opinion.

Judgment of
the majority of
the Court of
Exchequer.

The majority of the Court, however, held that, though the grant was valid as against the grantor, the grantor could create no rights, for the interruption of which the grantee could sue a third person in his own name. The rights of the riparian proprietor are entirely derived from his possession of land abutting on a stream. If he grants away any portion of land so abutting, the grantee becomes a riparian proprietor, and by consequence entitled to riparian rights. If the grant is of lands not abutting, then clearly there are no water rights by occupation. A person cannot create by grant new rights of property, so as to give the grantee a right of suing in his own name for an interruption of the right by a third party. Consequently, the grantee cannot have them apart from the riparian estate, even by express grant.²

Nuttall v.
Bracewell.

Subsequently in *Nuttall v. Bracewell*,³ Bramwell, B., reiterated his opinion, and added, as a further reason, that a man entitled to land may grant to others estates in and rights of enjoyment of it, and the grantees may maintain actions against those who disturb them. The right of granting water rights is presumably grantable like others. "Those who deny this, must give a reason for

¹ 3 H. & C. 300.

² *Hill v. Tupper*, 2 H. & C. 121.

³ L. R. 2 Ex. 1.

it, and I have heard of none." The rest of the Court,¹ however, distinguished the case before them from *Stockport Waterworks Company v. Potter*.² There the water of the River Mersey was abstracted for the use of the inhabitants of Stockport for domestic purposes, and the complaint was that the defendants had fouled it. The Court decided that a riparian proprietor could not grant his water rights apart from his estate. In the present case two adjoining riparian proprietors agreed to divert a stream so that it should run in two channels instead of one, the water passing again into the old stream below their land, and flowing down to the lower proprietors as before. The Court decided that "what is done by the two proprietors may be supposed to be a more convenient way of making use of the flow of water while it in no way diminishes or affects the rights of the other proprietors."³

Holker v. Porritt,⁴ which we have already noticed, was distinguished from *Stockport Waterworks Company v. Potter*⁵ because that was a diversion of water made from a stream by a person who had no power to make it; not a taking by a riparian proprietor out of a stream for his own purposes, but the making of a new stream, and carrying away the water in immense quantities for consumption elsewhere. *Ormerod v. Todmorden Mill Company*⁶ is indistinguishable. There the Court of Appeal approved and adopted the view taken by Pollock, C.B., and Channell, B., and approved by Wilde, B., that the grant of a right to flowing water by a riparian owner is valid only against himself, and cannot confer rights against others.

The inquiry what are ordinary and what extraordinary uses of water in streams depends largely upon custom and local circumstances; and the law does not lay down any fixed rule. Reasonable use is not a question of law, but of fact, to be determined by the jury or Court from all the circumstances of the case; yet, like any other finding of fact, it is subject to review, and will be set aside if against the evidence, or not supported by it.

Some remarks of Redfield, C.J.,⁷ are valuable, as giving an indication of the considerations most generally applicable: "In regard

Holker v. Porritt.

Ordinary and extraordinary uses of water.

Remarks by Redfield, C.J., on the considerations applicable.

¹ Pollock, C.B., Channell, Martin, and Pigott, BB.

² 3 H. & C. 300.

³ L. R. 2 Ex. 1, per Channell, B., delivering the judgment of himself and Pollock, C.B., at 14.

⁴ L. R. 8 Ex. 107.

⁵ 3 H. & C. 300.

⁶ 11 Q. B. Div. 155. See *Kensit v. Great Eastern Railway Company*, 27 Ch. Div. 122, where a lower proprietor was held not entitled to recover against the licensee of a higher proprietor not doing injury.

⁷ *Snow v. Parsons*, 28 Vt. 459, at 461, cited Gould, *Law of Waters*, § 220, where the United States authorities on this and the kindred subjects are exhaustively considered; *Canfield v. Andrews*, 41 Am. R. 828.

to many uses of the water in streams, it has been so long settled by common consent, or is so obvious in itself, that it is determinable as matter of law. Such are the uses for irrigation, for propelling machinery, and for watering cattle, and some others. And in regard to some *débris* or waste deposits in such streams, there would seem to be no question. The uniform practice, the convenience, and, in some instances, the indispensable necessity would seem sufficiently to decide such cases. Among these may be named the infusion of soap-dyes and other materials used in manufacturing, into the streams by which the machinery is propelled. The deposit of sawdust to some extent is nearly indispensable in the running of saw-mills,¹ and most other machinery used in the manufacture of wood and propelled by water-power. The reasonableness of such use must determine the right, and this must depend upon the extent of detriment to the riparian proprietors below. If it essentially impairs the use below, then it is unreasonable and unlawful, unless it is a thing altogether indispensable to any beneficial use at every point of the stream. An extent of deposit which might be of no account in some streams might seriously affect the usefulness of others. So, too, a kind of deposit which would affect one stream seriously would be of little importance in another.”²

Subterranean
streams
flowing in
defined
channels.

Dickinson
v. Grand
Junction
Canal
Company.

The cases we have hitherto considered have had reference to natural streams on the surface flowing in defined channels. It is manifest that besides these there may be subterranean streams running in defined channels. Indeed, they were a very frequent feature in ancient Greece.³ The law with regard to them is laid down by Pollock, C.B., in *Dickinson v. Grand Junction Canal Company*:⁴ “If the course of a subterranean stream were well known, as is the case with many which sink under ground, pursue for a short space a subterranean course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover had the stream been wholly

¹ As to this, see a most valuable judgment, *Red River Roller Mills v. Wright*, 44 Am. R. 194.

² In *Blair v. Deakin*, 57 L. T. 522, Kay, J., held that a lower proprietor is entitled to pure water; therefore, if one higher proprietor discharges a harmless chemical into the stream, and another does the same, and the conjunction produces contamination, he is entitled to an injunction against both. Cp. *Thorpe v. Brumfitt*, L. R. 8 Ch. 650, per James, L.J., at 656.

³ See Grote, *History of Greece* (2nd ed.), vol. ii. 292, and note; Abbott, *History of Greece*, vol. i. ch. 1; *Dudden v. Guardians of Clutton Union*, 1 H. & N. 627, per Pollock, C.B.: “If the channel or course under ground is known, as in the case of the River Mole, it cannot be interfered with;” at 630.

⁴ 7 Ex. 282, at 300, 301; *Cross v. Kitts*, 58 Am. R. 558.

above ground." This statement is approved in the House of Lords in *Chasemore v. Richards* ;¹ where also Lord Wensleydale says :² "The right to a natural stream flowing in a definite channel is not confined to streams on the surface, but the right to an underground stream flowing in a known and definite channel is equally a right *ex natura*, and an incident to the land itself as a beneficial adjunct to it, as was determined in the case of *Wood v. Waud*."³

To the same effect is *Collins v. Chartiers Valley Gas Company*,⁴ where it was said: "The distinction between rights in surface and in subterranean streams is not founded on the fact of their location above or below ground, but on the fact of knowledge, actual or acquirable, of their existence, location, and course."

Collins v. Chartiers Valley Gas Company.

2. The rights with regard to artificial streams differ considerably from those which belong to natural streams. In the latter case, each successive riparian proprietor is *prima facie* entitled to the unimpeded flow of the water in its natural course. In the former, any right to the flow of water must rest on some grant, either proved or presumed, from or with the owners of the lands from which the water is artificially brought.⁵ The water in an artificial stream, flowing in the land of the proprietor by whom it is caused to flow, is his property, and not subject to any rights of others. If a stream, so artificially constructed, is made to flow on a neighbour's land without his consent, an actionable wrong is committed. If there is a grant by the neighbour, the rights and liabilities of the persons concerned are regulated by it. Uninterrupted user of a neighbour's land, to discharge water on for a period of twenty years, is evidence of an easement; not that the land so sending water is bound to send it,⁶ but only that the land on which it is discharged is bound to receive it. Further, what was originally an artificial stream may become subject to the laws relating to natural streams, when it is shewn that the

Artificial streams.

¹ 7 H. L. C. 349, per Lord Chelmsford, at 374.

² 7 H. L. C. 349, at 384.

³ 3 Ex. 748.

⁴ 131 Pa. St. 143, 17 Am. St. R. 791, reference to this case may be made for the principle, definitely settled in the United States, that for unavoidable damage to another's land in the lawful use of one's own, no action can be maintained. "The use which inflicts the damage must be natural, proper, and free from negligence, and the damage unavoidable. On the question of negligence the question of knowledge is always important and may be conclusive. Hence the practical inquiry is: 1. Whether the damage was necessary and unavoidable; 2. If not, was it sufficiently obvious to have been foreseen, and also preventable by reasonable care and expenditure?" Cp. *Pennsylvania Coal Company v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445; *Wheatley v. Baugh*, 25 Pa. St. 528.

⁵ *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk*, 4 App. Cas. 121; *Kensit v. Great Eastern Railway Company*, 27 Ch. Div. 122.

⁶ *Mason v. Shrewsbury and Hereford Railway Company*, L. R. 6 Q. B. 578.

agricultural purposes, are not permitted to be made for the purpose of conducting water into the land of a neighbour, because a man must not improve his premises in such a way as to injure his neighbour.¹

French law.

This distinction is found also in the French Code Civil: under which the tribunals are directed to decide in cases where a claim to make drains is made in such a way as to *reconcile the respect due to property with the interests of agriculture*² (*doivent concilier l'intérêt de l'agriculture avec le respect dû à la propriété*). This, Duranton³ interprets to mean that a landowner cannot make on his land any works which would change the natural passage of water upon the inferior estate, either by collecting it on a single point and giving it thereby a more rapid current, and making it more apt to carry sand, earth, or gravel upon the land; or by directing upon a point on the same land a much greater volume of water than it would have received without such works. The owner may make any work upon his land necessary or simply useful for the cultivation of it, such as furrows in a planted field, even though a storage or a diversion of water is an incidental result of his act. He may also, in planting vines or forming a meadow, make ditches for the irrigation of the meadow, or for the purpose of rendering his vines more healthy and vigorous.

English law as stated by Cotton, L.J., in *Hurdman v. North-Eastern Railway Company*.

The effect of this in English law would be to leave to the jury, in any doubtful case, whether the use of land were the natural use for purposes of agriculture, or to improve the estate. And this appears to be the law, as stated by Cotton, L.J., in *Hurdman v. North-Eastern Railway Company*:⁴ "If any one, by *artificial* erection on his own land, causes water, even though arising from natural rainfall only, to pass into his neighbour's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at suit of him who is so injured; and this view agrees with the opinion expressed by the Master of the Rolls in the case of *Broder v. Saillard*."⁵

Exception in *Nield v. London and North-Western Railway Company*.

This must be taken subject to the exception in *Nield v. London and North-Western Railway Company*,⁶ that "the flood is a common enemy, against which every man has a right to defend

¹ *De eo opere, quod agri colendi causa aratro factum sit, Quintus Mucius ait, non competere hanc actionem. Trebatius autem, non quod agri, sed quod frumenti duntaxat quaerendi causa aratro factum sit, solum excepit. Sed et fossas agrorum siccandorum causa factas Mucius ait fundi colendi causa fieri; non tamen oportere corrivandæ aquæ causa fieri.* D. 39, 3, 1, §§ 3-4; *Martin v. Jett*, 12 La. Rep. 501.

² Art. 645.

³ Duranton, Nos. 164, 165.

⁴ 3 C. P. Div. 168, at 173. See *Bagnall v. London and North-Western Railway Company*, 7 H. & N. 423; 1 affd. H. & C. 544.

⁵ 2 Ch. D. 692, at 700.

⁶ L. R. 10 Ex. 4.

himself. And it would be most mischievous if the law were otherwise, for a man must then stand by and see his property destroyed out of fear lest some neighbour might say, 'You have caused me an injury.' The law allows what I may term a kind of reasonable selfishness in such matters; it says, 'Let every one look out for himself, and protect his own interest'; and he who puts up a barricade against a flood is entitled to say to his neighbour who complains of it, 'Why did not you do the same?' I think what is said in *Menzies v. Earl of Breadalbane*¹ is an authority for this, and the rule so laid down is quite consistent with what one would understand to be the natural rule."²

The distinction, then, is between water coming on land in the normal way and water coming on abnormally. The former is an incident to property from which a man may not relieve himself at the expense of his neighbour; the latter is a common enemy, against the advent of which each may take precautionary measures without regarding his neighbour; though when the evil has once befallen him, he may not shift it from his own shoulders to those of his neighbours; he may protect his land, but may not relieve his land from actual injury at the expense of his neighbour.³

Secondly, as to subterranean water.⁴

In *Acton v. Blundell*⁵ the plaintiff's claim against the defendant was for subtracting water from plaintiff's well by carrying on mining operations on defendant's own land. The well had not

(2) As to subterranean water.
Acton v. Blundell.

¹ 3 Bligh (N.S.), 414.

² Per Bramwell, B., L. R. 10 Ex., at 7.

³ *Whalley v. Lancashire and Yorkshire Railway Company*, 13 Q. B. Div. 131.

⁴ Rankin, Land-Ownership in Scotland, 399-405.

⁵ 12 M. & W. 324; *Wheatley v. Baugh*, 25 Pa. St. 528, where the French writers are referred to. See Law Mag. (N.S.) (1844), vol. i. 187. *Broder v. Saillard*, 2 Ch. D. 692, was professedly followed by Kekewich, J., in *Reinhardt v. Mentasti*, 42 Ch. D. 685, where an hotel proprietor was enjoined from continuing a fire in his kitchen so near to the plaintiff's wine cellar as to make it too hot for the storage of wine. In *Broder v. Saillard* the defendant was restrained from keeping or suffering any horses in his stable so as to occasion a nuisance, and there was a declaration of his liability for not preventing the damp and moisture from his premises from going through the flank wall of the plaintiff's house, by reason of made earth or other artificial construction existing on the defendant's premises or by reason of any leakage in any soil pipe or drain pipe on the same. In the one case, then, the ordinary enjoyment of property was interfered with; in the other no more than a special and particular user. A lack of suitably cool wine, when caused by a neighbour's fire warming the wall against which the owner chooses to put his wine, may possibly in law be nuisance interfering with "the comfortable enjoyment" of a dwelling-house and causing "serious annoyance and disturbance"; which are the tests applied by Jessel, M.R., in *Broder v. Saillard*, 2 Ch. D. 692, at 701; but another owner might choose to use the same apartment as a store closet or for some other purpose for which the fire might be a benefit, e.g., for hanging clothes, packing papers, keeping tools. The nuisance then arises from a special or possibly arbitrary user of the plaintiff, so that on the assumption the decision is correct, not general considerations but private whim may go far to determine what is or is not a nuisance. *Robinson v. Kilvert*, 41 Ch. Div. 88, does not appear to have been present to Kekewich, J.'s, mind at the time of his judgment. Cp. *Christie v. Davey* (1893), 1 Ch. 316; also per Lord Selborne, *C. Ball v. Ray*, L. R. 8 Ch. 467, at 469.

been made twenty years. The Exchequer Chamber held that there was no right of action, yet intimated "no opinion whatever as to what might be the rule of law if there had been an uninterrupted user of the right for more than the last twenty years."

Chasemore
v. Richards.

Chasemore v. Richards¹ raised this point. The plaintiff was the occupier of an ancient mill who had himself, or by his predecessors in title, for more than sixty years before action enjoyed as of right the flow of a river for the purpose of working the mill. The water was supplied by the rainfall of a district many thousands of acres in extent, which percolated through the strata to the river. The defendant represented a local board, which, for the purpose of supplying its district with water, sank a well and pumped up large quantities of water, thereby intercepting an underground supply, not running in any defined channel, which would otherwise have found its way into the river and so to the plaintiff's mill.

Opinion of
the judges
delivered to
the House of
Lords by
Wightman, J.

Wightman, J., delivering the unanimous opinion of the judges who were summoned, said: "It is impossible to reconcile such a right [as that claimed by the plaintiff] with the natural and ordinary rights of landowners, or to fix any reasonable limits to the exercise of such a right. Such a right as that contended for by the plaintiff would interfere with, if not prevent, the draining of land by the owner. Suppose, as it was put at the bar in argument, a man sank a well upon his own land, and the amount of percolating water which found a way into it had no sensible effect upon the quantity of water in the river which ran to the plaintiff's mill, no action would be maintainable, but if many landowners sank wells upon their own lands, and thereby absorbed so much of the percolating water by the united effect of all the wells as would sensibly and injuriously diminish the quantity of water in the river, though no one well alone would have that effect, could an action be maintained against any one of them? and, if any, which? for it is clear that no action could be maintained against them jointly." The conclusion was that "such a right as that claimed by the plaintiff is so indefinite and unlimited that, unsupported as it is by any weight of authority we do not think that it can be well founded, or that the present action is maintainable."

Lord Wens-
leydale's
difficulty.

The House of Lords² coincided in this conclusion. Lord Wensleydale, however,³ "felt very great difficulty in coming to a conclusion" satisfactory to his mind. The question in this case

¹ 7 H. L. C. 349, at 371; affirming the Ex. Ch. 2 H. & N. 168, giving judgment without argument on the authority of *Broadbent v. Ramsbotham*, 11 Ex. 602.

² Lords Chelmsford, Cranworth, Kingsdown, Brougham, and Wensleydale.

³ 7 H. L. C. at 380.

seemed to resolve itself into an inquiry "whether the defendant exercised his right of enjoying the subterraneous waters in a reasonable manner." "Had he," says Lord Wensleydale, "made the well and used the steam-engines for the supply of water for the use of his own property and those living on it, there could have been no question. If the number of houses upon it had increased to any extent, and the quantity of water for the families dwelling on the property had been proportionately augmented, there could have been no just grounds of complaint, but I doubt very greatly the legality of the defendant's acts in abstracting water for the use of a large district in the neighbourhood, unconnected with his own estate, for the use of those who would have no right to take it directly themselves, and to the injury of those neighbouring proprietors who have an equal right with themselves."¹

The House of Lords were unanimous in holding that one proprietor could not claim any right to the flow of subterranean water, unless flowing in a defined current, as against another proprietor, even though there may have been an actual taking of water flowing in that way during a period that would have conferred prescriptive rights had it been possible for them to be acquired. The doubt of Lord Wensleydale was whether one proprietor could drain the subterranean waters of a district, not for his own use merely, but to supply persons who had no rights whatever in or about the lands whence the water was collected, being neither landowners, nor residents, nor interested in the district, from which the supply was drawn. As this doubt was not shared by the other law Lords, the law may be considered as settled—that in no way whatever can a title be acquired to water flowing under ground in no defined channel, so as to impose an obligation on proprietors in their methods of draining and the use of their land.

A limitation is, however, imposed by the decision in *Grand Junction Canal Company v. Shugar*.² A local board, by means of a drain, intercepted water that the canal company had been used to draw from a pond. The local board asserted their right to intercept subterranean springs, and justified what they had done on the ground that the diminution of the plaintiff's supply of water was caused as a natural consequence of their assertion of their legal right. This view was adopted by the Master of the Rolls; but his judgment was overruled by the Lord Chancellor (Hatherley), holding that *Chasemore v. Richards*³ had no bear-

Effect of the decision of the House of Lords.

Limitation to the right to percolating water: *Grand Junction Canal Company v. Shugar*.

¹ 7 H. L. C. at 388.

² L. R. 6 Ch. 483.

³ 7 H. L. C. 349.

ing at all on what might be done with water going in a defined channel, and that if underground water could not be collected without touching water in a defined channel it could not be got at all. "You are not, by your operations or by any act of yours, to diminish the water which runs in this defined channel, because that is not only for yourself, but for your neighbours also, who have a clear right to use it, and have it come to them unimpaired in quality and undiminished in quantity."¹

¹ L. R. 6 Ch. 488.

CHAPTER III.

FIRE.

THE doctrine of the common law as to the duty generally owed by the owner of land to his neighbours is summed up in the head-note to *Rylands v. Fletcher*, in the House of Lords,¹ as follows: "Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned." The reasoning in this case obviously applies to fire as one of the things which, if a man brings on his land, he is bound to see does no harm to his neighbour.

The application of the principle to the case of fire was actually made in *Jones v. Festiniog Railway Company*,² by Blackburn, J., who said: "The general rule of common law is correctly given in *Fletcher v. Rylands*, that when a man brings or uses a thing of a dangerous nature on his own land he must keep it in at his own peril; and he is liable for the consequences if it escapes and does injury to his neighbour. Here the defendants were using a locomotive engine with no express parliamentary powers making lawful that use, and they are therefore at common law bound to keep the engine from doing injury, and if the sparks escape and cause damage, the defendants are liable for the consequences, though no actual negligence be shewn on their part."

The authorities as to the common law duty of safeguarding a fire on land, *eo nomine*, commence with a case in the *Liber Assisarum*. "A man sued a bill against another for burning his house *vi et armis*. The defendant pleaded not guilty. It was

¹ L. R. 2 H. L. 330.

² L. R. 3 Q. B. 733, at 736.

found by the verdict of the inquest that the fire broke out suddenly in the house of the defendant, he knowing nothing about it, and burned his goods and also the house of the plaintiff. Wherefore upon this verdict it was adjudged that the plaintiff should take nothing by his writ, but should be amerced."¹

Rolle's
Abridgement.

In Rolle's Abridgement² the case is stated as follows: "If fire (I know nothing of it) suddenly break out in my house and burn my goods, and also the house of my neighbour, my neighbour shall have an action on the case against me, 42 Ass. 9. Admit. But it seems that it was adjudged there that the action did not lie; "because it was *vi et armis*." Gibbons's conclusion from this is: "If anything is to be inferred from the Year-book it is that it was adjudged that the action did not lie because the fire was not caused by the plaintiff's [? defendant's] fault." The passages quoted in Gibbons, Law of Dilapidations, from the Year-book and from Rolle, nevertheless seem perfectly consistent. The objection evidently was that the action was wrongly conceived, being brought in trespass and not upon case. The jury found that "the fire broke out suddenly in the house of the defendant, he knowing nothing about it." The judgment was that the injury was consequential, and therefore should have been brought in case, and did not lie because it was alleged *vi et armis*.³

Beaulieu v.
Fingham.

A case more often cited than, and subsequent to, the last is Beaulieu v. Fingham.⁴ The declaration alleged that every person by the custom of this realm shall keep his fire safely and securely, and is bound so to keep it, lest any damage happen to his neighbour in any manner, and that Roger so negligently kept his fire that for want of due keeping his fire spread to the house of William, and William's goods were burned. Markham, J., said: "A man is bound to answer for the act of his servant or of his guest in such case, for if my servant or my guest puts a candle in a window and the candle sets light to the thatch and burns my house down and the house of my neighbour also, in this case I shall answer to my neighbour for the damage he sustained." "I shall answer to my neighbour for him who

¹ Liber Assisarum, 42 Ed. III. 259, pl. 9, translated in Gibbons, Law of Dilapidations, 136. Most of the old cases on the law are carefully collected in Gibbons, Law of Dilapidations, together with a mass of very loose and inaccurate reasoning upon them (e.g., on Jarney v. Lowgar, 134-5; or compare note on the words "safely and securely," 136, with the judgment of Tindal, C.J., Ross v. Hill, 2 U. B. 877, at 889-90, cited as the authority), which, however, cannot in a general treatise be examined in detail. As to Amercement, see Co. Litt. 126 a.

² Action sur Case (B), pur Fewe, 2.

³ See Hunter v. Walker, 6 N. Z. L. R. 690. The History of this allegation of *vi et armis* is summarised in Holmes, The Common Law, 84 *et seqq.*; and the whole learning is elaborately collected and arranged in a note to Hammond's edition of Com. Dig. under Action (M2). Action upon the case or trespass. See also *post* 665.

⁴ 2 Hen. IV. 18, pl. 6.

enters my house by my leave or knowledge, where he is guest to me or my servant, if he acts, or either of them acts, in such a way with the candle or other things that my neighbour's house is burned. But if a man outside my household against my will sets fire to the thatch of my house or does otherwise *per quod* my house is burned and also the houses of my neighbours, I shall not be held to answer to them, because this cannot be said to be ill on my part, but against my will."¹ This case is cited as the authority for the statement in Comyn's Digest, Action on the Case for Negligence (A 6), and in Viner's Abridgement, Actions (B) For Fire—that by the common law a man in whose house a fire originated, though by no act or fault of his, and even if it were accidental, was liable for whatever damage it caused to the house or goods of another; it is manifest that the liability there alleged does not necessarily arise independently of the negligence of master or servant or guest; further, negligence is alleged as the gist of the action. The point, then, that a man is liable for a purely accidental fire is not made out.²

In Cro. Eliz. 10, there is an anonymous case: "Snagg moved Anonymous case. this case, and demanded the opinion of the judges on it. J. S. with a gun at the door of his house shoots at a fowl, and by this fireth his own house and the house of his neighbour, upon which he brings an action on the case generally, and doth not declare on the custom of the realm, as 2 Hen. IV., viz., for negligently keeping his fire. The question was, if this action doth lie? and the Court held it did, for the injury is the same, although the mischance was not by common negligence, but by a misadventure; and if he had counted upon the custom of the realm as 2 Hen. IV., the action had not been well brought; yet *consuetudo regni est communis lex*."

The objection may be noted, that though the fire was not caused by negligence, the act of firing the gun in the place in question may still have been improper, and thus, though the gun was discharged without negligence, the discharging it at all may have been fault enough to render the defendant liable for the consequences of his act.

From the early authorities it appears then that, by the old Conclusion as to the old law.

¹ To this, Horneby, the defendant's counsel, says: "This defendant is ruined and for ever impoverished if this action can be maintained against him: for then twenty other actions will be brought against him for the same matter." Thirning answers: "*Que est ces a nous? Il est mieux que il soit tout defait, que la ley soit chaunge pur luy*." In Y. B. 28 H. VI. 7, pl. 7 is another case where action was brought shewing that the fire was caused through negligence. No judgment was given.

² Cp. Allen v. Stephens n, 1 Lutw. 90, where a declaration alleging fire caused by the negligence of a lodger was held bad for "strangeness and insufficiency." An action for fire on the custom of the realm was held not to lie against a man's wife, or servant, or guest in Shelly v. Barr, Bendloe, 153.

I. Exception where the fire was caused by the act of a third person.

law, if a fire occurred in a man's house or field, he was, *prima facie* at any rate, bound to control it so as to prevent damage to his neighbour;¹ or to state the point in the words of Lord Tenterden, C.J.,² "if a fire began on a man's own premises, by which those of his neighbour were injured, the latter, in an action brought for such an injury, would not be bound in the first instance to shew how the fire began, but the presumption would be (unless it were shewn to have originated from some external cause) that it arose from the neglect of some person in the house." To this rule there appears to have been an exception—where the fire was caused by the act of a third person without any intervention of the *terre* tenant.³ Thus, in the 2nd Inst.⁴ it is stated to have been adjudged in 9 Edward II. that if thieves burn the house of the tenant for life without evil keeping of the lessee for life's fire, the lessee shall not be punished therefor in an action of waste.

Crogate v. Morris.

In Crogate v. Morris⁵ it is indeed said, by way of illustration, and perhaps distinguishing a friend from a stranger, "if my friend come and lie in my house, and set my neighbour's house on fire, the action lieth against me." Rolle⁶ contains the proposition, "If a stranger, against my will, puts fire in my house by which the house of my neighbour is burnt, no action lies against me"; while in Comyns's Digest⁷ it is laid down that in an action for negligently keeping a fire "The defendant may plead that an unknown person set fire to his house *per quod*, and traverse the negligence." With this accords what was said by Holt, C.J., in Turberville v. Stampe,⁸ "If a stranger sets fire to my house and burns my neighbour's, no action lies against me."

Turberville v. Stampe.

Another limitation may be collected from the same case of Turberville v. Stampe,⁸ which was an action on the case for negligently keeping a fire lit in a field, that extended to the plaintiff's field and burned his clothes. The objection was: "There is a difference between fire in a man's house and in the fields; in some counties it is a necessary part of husbandry to make fire in the ground, and some unavoidable accident may carry it into a neighbour's ground, and do injury there." On this

¹ Smith v. Brampton, Smith v. Frampton, 2 Salk, 644. In Y. B. 21 Ed. I. (ed. Horwood) 30, there is a case determining that for a fire caused by his default the tenant is liable in damages for waste.

² Becquet v. MacCarthy, 2 B. & Ad. 951, at 958.

³ Co. Lit. 53 a.

⁴ 2 Inst. 303.

⁵ Brownlow and Goldsborough, 197. Cp. Allen v. Stephenson, 1 Lutw. 90.

⁶ Abr. Action sur Case (B), per Fewe. This is no more than a summary of what is said by Markham, J., in the case cited before from Y. B. 2 Hen. IV. 18, pl. 6.

⁷ Pleader (2 P. 3), citing 1 Brown Entries 29 (45).

⁸ 12 Mod. 151, 1 Ld. Raym. 264.

Holt, C.J., and the rest of the Court, Turton, J., dissenting, held: Holt, C.J.'s judgment.
 "Every man must so use his own as not to injure another. The law is general; the fire which a man makes in his fields is as much his fire as his fire in his house; it is made on his ground, with his materials, and by his order; and he must at his peril take care that it does not, through his neglect, injure his neighbour; if he kindle it at a proper time and place, and the violence of the wind carry it into his neighbour's ground and prejudice him, this is fit to be given in evidence."¹

Thus a second exception is, where the damage is caused by the intervention of a natural agency not to be calculated on, and the act is one done in the natural, ordinary, and proper enjoyment of property. To this effect also is the civil law: *Si quis in stipulam suam vel spinam comburendæ ejus causa ignem immiserit et ulterius evagatus et progressus ignis alienam segetem vel vineam læserit, requiramus num imperitia ejus aut negligentia id accidit; nam si die ventoso id fecit, culpæ reus est; nam et qui occasionem præstat damnum fecisse videtur. In eodem crimine est, et qui non observavit ne ignis longius procederet. At si omnia quæ oportuit observavit, vel subita vis venti longius ignem produxit, caret culpa.*² II. Exception, where the damage is caused by the intervention of a natural agency not to be calculated on.

From *Turberville v. Stampe* we may extract yet a third exception. A man might kindle a fire on his land for the ordinary purposes of husbandry. For if "he must at his peril take care that it does not, through his neglect, injure his neighbour," the making the fire is lawful, and there must be neglect in order to fix liability.³ III. Exception, fire for the purposes of husbandry kindled without negligence.

Soon after *Turberville v. Stampe* was decided, the 6 Anne, c. 58 (c. 31 Ruffhead),⁴ was passed, which enacted by s. 6 "that no action, suit, or process whatsoever shall be had, maintained, or prosecuted against any person in whose house or chamber any fire shall"
6 Anne, c. 58 (31 Ruffh.), s. 6.

¹ "If, on the other hand, the fire has spread beyond its natural limits by means of a new agency—if, for example, after its ignition, a high wind should arise and carry burning brands to a great distance, by which a fire is caused in a place which would have been safe but for the wind—such a loss might fairly be set down as a remote consequence for which the railroad company should not be held responsible"; per Lawrence, C.J., *Fent v. Toledo, Peoria, and Warsaw Railway Company*, 14 Am. R. 13.

² D. 9, 2, 30, § 3.

³ *Furlong v. Carroll* (1882), 7 Ont. App. 145, *post* 597.

⁴ The clause set out in the text was originally to continue for the space of three years, but 10 Anne, c. 24 (c. 14 Ruffhead), s. 1 made it perpetual. In a note to Coke upon Littleton, Hargrave's edition (57 a, note 1), it is said, that, at common law, lessees are not liable for fire, either accidental or negligent: which is proved, as to the "accidental," by *Fleta*, lib. i. c. 12, *fortuna ignis vel hujus modi eventus inopinati*; as to the "negligent," by the Countess of Shrewsbury's case, 5 Co. Rep. 13 b; that the Statute of Gloucester (6 Ed. 1, c. 1), by making tenants for life and years liable to waste without any exception, made them liable for destruction by fire; but by the statute of Anne the ancient law was restored. See *Pantam v. Isham*, 1 Salk. 19; where "one seised of a house in fee made a lease at will, and lessee negligently burns the house, no action lies; for he had it in his power to secure himself by covenant. *Secus*, if lessee for years made a lease at will, not but

accidentally begin, nor any recompense be made by such persons for any damage suffered or occasioned thereby, any law, usage, or custom to the contrary notwithstanding."

14 Geo. III.
c. 78, s. 86.

By 14 Geo. III. c. 78, s. 86, the Acts of Anne and 12 Geo. III. c. 73,¹ which had been substituted for them, were all repealed, but the clause respecting fires was re-enacted, with a change in the wording: "Any person in whose house, chamber, stable, barn, or other building, or on whose estate, any fire shall accidentally begin."

Vaughan v.
Menlove.

Vaughan v. Menlove² is the first reported case after Turberville v. Stampe. The defendant negligently³ managed a stack of hay on his premises, which took fire, and destroyed the plaintiff's property. The Court held that the test applicable in determining the question of liability was not whether the defendant acted to the best of his own individual skill and judgment, but, in the words of Tindal, C.J.: "It is for the jury to say whether or not under the circumstances the party has conducted himself with such a degree of care and caution as might be looked for in a prudent man." "To hold the degree of care to be sufficient if co-extensive with the judgment of the individual would introduce a rule as uncertain as it is possible to conceive. In the present case it appears to me that the defendant not only failed to observe the degree of care and caution that the law required of him, but was guilty of very gross negligence." In M'Kenzie v. M'Leod⁴ the law of Scotland was proved to be the same—that for actual negligence the tenant is liable. In neither case was the attention of the Court in any way called to the statute.⁵ A case tried at the assizes for Berkshire a year or two previously, before Alderson, B., was, however, cited by Serjeant Talfourd, and approved of by the Court. There defendant, in burning couch

Judgment of
Tindal, C.J.

M'Kenzie v.
M'Leod.

that he might secure himself by covenant; but because he is answerable over to his lessor, in that respect he shall have an action on the case. Also the Court held no action lay against the defendant for the stable he took if the fire ceased there; but if it goes on and burns his next neighbour's, he shall have an action for his loss, because he is a stranger, and had it not in his power to make him covenant to be careful."

¹ Both these Acts, 14 Geo. III. c. 78 & 12 Geo. III. c. 73, related mainly, if not solely, to Metropolitan buildings; see *post*, n.³ 594. See Cleland v. South British Insurance Company, 9 N. Z. L. R. 177, for a full discussion of the general application of ss. 83, 84, & 86 of 14 Geo. III. c. 78.

² 4 Scott 244, at 253; 3 Bing. N. C. 468.

³ "When the condition of the stack, and the probable and almost inevitable consequence of permitting it to remain in its then state, were pointed out to him, he abstained from the exercise of the precautionary measures that common prudence and foresight would naturally suggest, and very coolly observed that he would chance it": per Vaughan, J., 4 Scott 244, at 254.

⁴ 10 Bing. 385.

⁵ Which does not apply to Scotland. Westminster Fire Office v. Glasgow Provident Society, 13 App. Cas. 699; per Lord Watson, at 716: "In my opinion the Act was not intended by the Legislature to have any application to Scotland."

in his field, set fire to and destroyed a plantation adjoining. His act was found to be a negligent one, and he was held liable.¹

On the other hand, Blackstone says :² “ By the common law, Blackstone's view of the operation of the statute. if a servant kept his master's fire negligently, so that his neighbour's house was burnt down, an action lay against the master ; but now the common law is altered by the statute 6 Anne.”

This passage was cited by Lord Lyndhurst, C., in *Viscount Canterbury v. Attorney-General*,³ who yet refrained from giving Lord Lyndhurst, C., in Viscount Canterbury v. Attorney-General. an opinion on the point raised by it, observing : “ By the statute, a party on whose estate a fire shall accidentally begin, shall not

be liable to an action for any damage which may be thereby occasioned. Sir William Blackstone's construction is, that although the fire be occasioned by the negligence of the party, he shall not be liable.” The Lord Chancellor then called attention to the fact that in *Vaughan v. Menlove*, the Court of Common Pleas had decided contrary to Sir William Blackstone's opinion, and that the law of Scotland appeared to coincide with the view of the Common Pleas ; and pointed out that in his opinion the case before him could be decided on grounds rendering any decision on the point unnecessary ; these he then proceeded to state. Shortly after occurred the case of *Filliter v. Phippard*,⁴ where the point had to be considered. Denman, C.J., delivering the judgment of the Queen's Bench, held that the word “ accidentally ” in the Act of Parliament, as applied to fire, excluded “ negligently,” so that, in a case of negligence, the liability for fire still existed.

The effect of this decision is to require the plaintiff affirmatively to shew negligence before he is entitled to recover ; unless, indeed, the facts are such as raise the inference of negligence. Thus, in *Piggot v. Eastern Counties Railway Company*⁵—a case decided before *Filliter v. Phippard*, though throwing light on it—to shew that the fire for which action was brought was caused by sparks or particles of ignited coke emitted from the funnel or chimney or from the fire-box of the engine, a witness stated that he had frequently seen pieces of ignited coke fall from the lower part of

¹ 4 Scott 244, at 248. Where a fire destroyed the defendant's house, leaving one of the walls standing in a dangerous condition, and the defendant knowing the fact neglected to secure or support the wall or to take it down, and some days after the fire it was blown down and damaged the plaintiff's house, the defendant was held, under the French law of Quebec, not entitled to shelter himself under the plea of *vis major*, *Nordheimer v. Alexander*, 19 Can. S. C. R. 248.

² 1 Bl. Comm. 431.

³ (1843) 1 Phil. 306, at 320, 4 St. Tr. N. S. 767. The history of the duty to keep a fire so as to prevent it occasioning injury to a neighbour is traced in detail in the Lord Chancellor's judgment in this case.

⁴ 11 Q. B. 347 ; *Hunter v. Walker*, 6 N. Z. L. R. 690, at 694. This case establishes that the enactment to New Zealand.

⁵ (1846) 3 C. B. 227 ; to the same effect is *Grand Trunk Railroad Company v. Richardson*, 91 U. S. (1 Otto) 454.

Judgment of
Tindal, C.J.

Judgment of
Maule, J.

the engine. Other witnesses stated that they had frequently seen small particles of coke come from the chimneys of the company's engines, and that, sometimes, ignited coal fell from the fire-box and were thrown to a considerable distance. Tindal, C.J., held this constituted abundant evidence of negligence, and likened the case to *Beaulieu v. Fingham*,¹ adding, "there was no suggestion that it was necessary to define the particular sort of negligence that was complained of." And Maule, J., said "the matter in issue was whether or not the plaintiff's property had been destroyed by fire proceeding from the defendant's engine; and involved in that issue was the question whether or not the fire *could* have been so caused"; subsequently he adds with reference to damage done by fire to buildings adjoining the railway: "I am far from saying that it is impossible that this could have occurred without negligence on the part of the company. But it at least affords a strong presumption of negligence, in the absence of evidence to shew that something had been done by the company to lessen the chances of danger." In *Piggot v. Eastern Counties Railway Company*² the statute does not appear to have been mentioned during the argument; the case turned on negligence at common law.

14 Geo. III.
c. 78, s. 86.

The effect of 14 Geo. III. c. 78, s. 86,³ seems to be that whereas before the Act, on a fire occurring, liability was assumed unless it was shewn to have been due to the acts of strangers or to the unforeseen action of nature; since, the statute liability is negatived till circumstances are shewn from which the inference of negligence may be drawn. Then it is for the defendant to shew either that the fire was caused (a) by the act of strangers, or (β) by some unlooked-for natural agency, or (γ) by accident in its widest sense—*e.g.*, by an occurrence similar to that in *Snook v. Grand Junction Water Company*.⁴ The effect of the statute may be stated as changing the *onus*, and limiting the class of acts importing legal wrong; or as a declension from the highest

¹ Y. B. 2 H. IV. 18, pl. 6.

² 3 C. B. 229.

³ The bulk of the statute was confined to the Metropolis, and was repealed by 28 & 29 Vict. c. 90, s. 34. Secs. 83 and 86 alone remain. They stand in the anomalous position of being general enactments in a local Act. In *Richards v. Easto*, 15 M. & W. 244, at 251, Parke, B., says the Act "is not of a local and personal character *only*, some of the clauses affecting all the Queen's subjects, as the 84th and 86th, relating to accidental fires, and the statute is in that respect public." This view is approved in *Filiter v. Phippard*, 11 Q. B. 347, per Lord Denman, at 355. Sec. 83 was held by Lord Westbury, in *Ex parte Gorely*, 4 De G. & S. 477, to apply to the whole of England, and not to be confined to the Metropolis. This decision was doubted in *Westminster Fire Office v. Glasgow Provident Society*, 13 App. Cas. 699, by Lord Watson, at 716, and by Lord Selborne, at 713. Neither s. 83 nor s. 86 applies to Ireland, as the Act was passed prior to the Union; see *Andrews v. Patriotic Assurance Company of Ireland*, 18 L. R. Ir. 355. The history of the Act is fully considered in *Cleland v. South British Insurance Company*, 9 N. Z. L. R. 177.

⁴ 2 Times L. R. 308. Cp. *Green v. Chelsea Waterworks Company*, 10 Times L. R. 175, 259 (C. A.).

degree of diligence¹ to that required of a prudent man in the provident conduct of his business.²

A question has been raised whether, in the event of a fire happening without negligence, the person responsible for the premises can be rendered liable, "because, in the opinion of a jury, he did not keep on hand at all times proper appliances to put out a fire in case one should accidentally arise." There seems to exist a difference of obligation in respect to the different character of buildings involved. Care must in all cases be proportioned to risk. Since, then, the breaking out of fire in dwelling-houses and buildings used for domestic purposes is of uncommon occurrence, the provision of appliances to put out fire is not necessary. In the use of fire for manufacturing purposes there is a difference; the risk is greater, and constant care is in some cases required to prevent its escape. Accordingly, where fires are liable to originate in engine and boiler-rooms, and the construction of the building is such that the surroundings are inflammable, an obligation arises not only to use care in tending the furnaces that are requisite for carrying on the work, but appliances for extinguishing fire, if it should break bounds, should be at hand; for this is a precaution which every ordinarily prudent man would adopt for the preservation of his own property, and the neglect of it is negligence.³

Effect on liability of not keeping proper appliances to extinguish fire.

It remains to consider what the duty of a railway company is with regard to the construction and the use of their engines, with a view of avoiding liability for fire caused by them. This is well stated by Williams, J., summing up in *Fremantle v. London and North-Western Railway Company*:⁴ The company, "in the construction of their engines, were bound not only to employ all due care and all due skill for the prevention of mischief accruing to the property of others by the emission of sparks or any other cause, but they were bound to avail themselves of all the discoveries which science had put within their reach for that purpose, provided they were such as, under the circumstances, it was reasonable to require them to adopt. For example, if the danger to be avoided were insignificant or very unlikely to occur, and the remedy suggested were very costly and troublesome, or

Duty of railway company with regard to the construction and use of their engines. *Fremantle v. London and North-Western Railway Company.*

¹ *Rylands v. Fletcher*, L. R. 3 H. L. 330.

² *Vaughan v. Menlove*, 3 Bing. N. C. 468, 4 Scott 244.

³ *McNally v. Colwell*, 30 Am. St. R. 494; also note, Liability of private person for Fire, 501-507.

⁴ 2 F. & F. 337, at 340. A rule was moved for in this case, and refused: 10 C. B. N. S. 89. The statement of the law in the text was adopted by Keating, J., in *Dimmock v. North Staffordshire Railway Company*, 4 F. & F. 1058, as embodying "the rule by which the liabilities of companies for negligence in respect of their engines are governed." See also *Harrison v. Southwark and Vauxhall Water Company* (1891), 2 Ch. 409; *Groom v. Great Western Railway Company*, 8 Times L. R. 253.

such as interfered materially with the efficient working of the engine, then the jury would have to say whether it could reasonably be expected that the company should adopt such a remedy for such an evil." On the other hand, "if the risk were considerable, and if the expense or trouble or inconvenience of providing a remedy were not great in proportion to the risk, then they would have to say whether the company could reasonably be excused from availing themselves of such a remedy because it might, to some extent, be attended with expense or other disadvantage to themselves."

Mere occurrence of a fire sometimes evidence of negligence.
Scott v. London and St. Katharine Docks Company.

Dean v. M'Carty.

Here, again, a distinction must be taken. In some cases the mere occurrence of a fire is evidence of negligence.¹ As was said by Erle, C.J., in the Exchequer Chamber, in *Scott v. London and St. Katharine Docks Company*:² "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." In other cases something further should be shewn. This is stated in detail by Robinson, C.J., in *Dean v. M'Carty*, in the Queen's Bench of Upper Canada:³ "To hold that what is so indispensable, not merely to individual interests, but to the public good, must be done wholly at the risk of the party doing it, without allowance for any casualties which the act of God may occasion, and which no human care could certainly prevent, would be to depart from a principle which, in other necessary business of mankind, is plainly settled and always upheld; if it could be shewn that this business of clearing land could, by means which we can suppose to be within the reach of those employed in it, be done at a time, or in a manner that would make it wholly independent of any accident beyond the control of the party, then, perhaps, the bare fact of not having taken those certain means might be held to constitute negligence; in which case, the liability for damages would always as a matter of course follow the injury. But as we

¹ In the United States it has frequently been held that the burden is on the company to shew that the engines they use are properly constructed—*e.g.*, *Burke v. Louisville Railroad Company*, 19 Am. R. 618, and note at 623. The statute does not seem to have been alluded to in that case; which probably would not be held good law in England. The plaintiff has to prove his cause of action; to shew there has been a fire, and from an engine, does not prove negligence under the statute; some evidence of negligence would therefore appear requisite. See *Port Glasgow, &c. Sail Cloth Company v. Caledonian Railway Company*, 20 Rettie (H. L.) 35, and the remark of Lord Herschell, C., as to the *onus* of proof being on the Company, at 39. We have already noted that the statute does not apply to Scotland, *ante*, 592, n. 5. The *onus* would thus be on the defendants to excuse themselves for a fire caused by them.

² 3 H. & C. 596, at 601.

³ 2 Upp. Can. Q. B. 448.

cannot, I think, venture to hold that there are any certain means of avoiding such accidents, it must in such case be a question of fact for the jury, whether the defendant has any negligence to answer for or not."

This passage was cited and approved in *Furlong v. Carroll*¹ by the Canadian Court of Appeal in an admirable judgment by Patterson, J.A., in which the English authorities are considered and reviewed. The case may serve as an illustration of the distinction between the two classes just adverted to. It was there held that where fire has been properly set out by a person on his land for the necessary purposes of husbandry, at a proper place, time, and season, and managed with due care, he is not responsible for damage occasioned by it; on the ground that every man has a right to use his land in the way that seems best to himself, though in using fire he is bound to use proper precautions that it does not extend to his neighbour's. But where a lighted match had been thrown down, which set fire to combustible material, and which the defendant could easily have put out, yet which he, instead, merely isolated, so that the fire, after burning for four or five days, spread to the plaintiff's premises and burnt them down, the defendant is responsible; for he has brought a dangerous thing on his ground, and is responsible for all the damage which is the natural consequence of its spreading, unless the spreading is a consequence of *vis major*.

The rule as to the amount of diligence which must be exercised is again expounded by Lord Neaves in a Scotch case² relating to "muirburning." He says: "The party conducting such an operation as a muirburn should exercise the care and diligence which a prudent man would observe in his own affairs, and which a prudent and conscientious man will observe as to the interests of his neighbours. While this is the general rule, it must be observed that in all cases the amount of care which a prudent man will take must vary infinitely according to circumstances. No prudent man in carrying a lighted candle through a powder-magazine would fail to take more care than if he was going through a damp cellar. The amount of care will be proportionate to the degree of risk run, and to the magnitude of the mischief that may be occasioned." The distinction drawn, in the Canadian cases just noticed, is between fire as an instrument of husbandry and fire as a dangerous

Furlong v. Carroll:
Judgment of
Patterson, J.A.

Mackintosh v. Mackintosh.

¹ (1882) 7 Ont. App. 145, at 161. See also *Hilliard v. Thurston*, 9 Ont. App. 514.

² *Mackintosh v. Mackintosh* (1864), 2 Macph. 1357, at 1362.

³ An operation recognized as legal, under limitations, by Scottish statutes; e.g., 13 Geo. III. c. 54 ss. 4-7.

Effect of
6 Anne. c. 58
(c. 31 Ruffhead).

Smith v.
London and
South-
Western
Railway
Company.

Brett, J.'s,
dissent.

agency.¹ Whether before the Act of Anne there was equal liability in both cases may be doubtful. Since the Act, the happening of the fire in the one class of cases is evidence of negligence; in the other, some overt act is necessary to raise the presumption of negligence, without which liability does not attach. This is apparent from *Smith v. London and South-Western Railway Company*,² where, sparks from a passing engine having set fire to a heap of dry grass piled up by the side of the railway, the fire was carried across a road by a high wind and burned the cottage of the plaintiff. Bovill, C.J., and Keating, J., held there was evidence of negligence to make the railway chargeable, but Brett, J., dissented. Adopting the doctrine of *Rylands v. Fletcher* the liability of the defendants was clear. The effect of the statute was to limit their liability to those cases where negligence could be inferred. It was agreed that the mere circumstance of the fire being caused by sparks or cinders emitted from the engine of the company was not enough to give a cause of action against them. This was on a similar ground to that by which, in the Canadian case, a fire, in certain circumstances, was held a mere lawful operation of husbandry—that what happened in that respect was an incident of legally authorized business. The majority of the Court thought the presence of the bundles of dry grass was evidence of negligence to go to the jury; while Brett, J., was of opinion there was no duty, “because it was not shewn that plaintiff’s property was of such a nature and so situate that the defendants ought to have known that, by permitting rummage and hedge-trimmings to remain on the banks of the railway, they placed it in undue peril.” Had the view of Brett, J., prevailed, the effect of the statute would have been extended by requiring negligence to be shewn with reference to any particular plaintiff.³ On appeal to the Ex-

¹ See *Gilson v. North Grey Railroad Company*, 35 Upp. Can. Q. B. 475; and *Hilliard v. Thurston*, 9 Ont. App. 514, deciding that the person who uses fire as a motor without legislative authority must bear the risk of the consequences rather than any individual whose property may happen to suffer from it. Cp. *Jones v. Festiniog Railway Company*, L. R. 3 Q. B. 733; *Powell v. Fall*, 5 Q. B. Div. 597; *Burroughs v. Housatonic Railroad Company*, 15 Conn. 124. In the *Canada Atlantic Railroad Company v. Moxley*, 15 Can. S. C. R. 145, the question was considered of what was evidence of negligence to go to a jury in setting fire to a manure heap. In *Peers v. Elliott*, 21 Can. S. C. R. 19, the judge at the trial having held that the absence of a spark protector to a steam-engine used in running a hay press was in point of law negligence, a new trial was granted on the ground of misdirection. In *Port Glasgow, &c., Sail Cloth Company v. Caledonian Railway Company* (1892), 19 Rettie 608, 20 Rettie (H. L.) 38, the absence of a spark arrester to an engine was held not conclusive of negligence. See also *Galer v. Rawson*, 6 Times L. R. 17 (C. A.)

² 2 L. R. 5 C. P. 98. As to the duty of the railway company in extinguishing the fire, see *Missouri Pacific Railroad Company v. Platzer*, 15 Am. St. R. 771 and note.

³ *Higgins v. Dewey*, 107 Mass. 494, is decided on the same principle. A late case is *Adams v. Young*, 58 Am. R. 789, with a note examining the authorities, at 795. *New Brunswick Railroad Company v. Robinson*, 11 Can. S. C. R. 688.

chequer Chamber,¹ the judgment of the majority in the Court below was sustained, Kelly, C.B., saying: "I am of opinion that no reasonable man would have foreseen that the fire would consume the hedge and pass across a stubble field and so get to the plaintiff's cottage." "It may be that they did not anticipate, and were not bound to anticipate, that the plaintiff's cottage would be burnt as a result of their negligence; but I think the law is, that if they were aware that those heaps were lying by the side of the rails, and that it was a hot season, and that therefore by being left there the *heaps were likely to catch fire*, the defendants were bound to provide against all circumstances which might result from this, and were responsible for all the natural consequences of it." The effect of this is that, negligence being found, it is not necessary to find, in addition, an antecedent probability of damage to any given property or person.²

Case reviewed
in the
Exchequer
Chamber:
Judgment of
Kelly, C.B.

In the Privy Council, in *Black v. Christ Church Finance Company*,³ the obligation on one lighting a fire or authorizing the lighting of a fire on land is thus stated: "The lighting of a fire on open bush-land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property." "And if he authorizes another to act for him, he is bound not only to stipulate that such precautions shall be taken, but also to see that these are observed, otherwise he will be responsible for the consequences."

Black v.
Christ
Church Fin-
ance Company.

We must now inquire what, if any, is the obligation that the use of land for a lawful purpose, though likely to prove dangerous to neighbours, imposes upon them.

On principle, it is clear that a man is entitled to the natural user of his property free from interruption or limitation by any special user of property by his neighbours. Yet this must not be stated universally. For instance, if an adjoining proprietor were to sow his field next a railway with wheat or any other combustible crop, and through the falling of a spark from a passing engine the whole were consumed, it could not be said he was contributory to his loss. He must be allowed to use his land after the construction of the railway as he did before it, where the use he is putting it to is not necessarily or inevitably dangerous.⁴ If, however, in mere wantonness he were to put up his

Limitation.

¹ L. R. 6 C. P. 14, at 20.

² See this case discussed, *ante*, 99.

³ (1894) App. Cas. 48, at 54. *Threlkeld v. White*, 8 N. Z. L. R. 513.

⁴ In *Gagg v. Vetter*, 13 Am. R. 322, at 346, there is to be found a most comprehensive review of the duty to prevent sparks from a chimney injuring a neighbour. In

hay or straw stacks close to the railway premises, or if he were to erect a powder factory close to the railway track, his conduct would bear a very different aspect.¹

Rule.

With this limitation, it may be said that the owner of lands adjacent to those on which dangerous operations are carried on may cultivate, or build upon, use his lands, or leave them in a state of nature, as he may see proper, and, by doing so, will take upon himself no other risks than those that are incident to the ordinary and natural user of the neighbouring properties,² and will, moreover, in the event of injury arising from the negligence of his neighbours, be entitled to a remedy for damages for all the consequences flowing in natural and uninterrupted sequence from their wrongful acts. There is this further limitation to be added, in the case of a company authorized to carry on any particular business by statute, that all the ordinary and necessary processes in carrying out the statutory purpose become themselves authorized, and, though bringing damage, do not legally import injury.³

The interpretation of the Act 14 Geo. III. c. 78, s. 86, excluding fires arising from defendant's negligence from the protection of the Act, is the same in the United States⁴ as in England and Canada.⁵

Insurance
against fire.

Story, J., has elaborately discussed, in a considered judgment,⁶ the question whether insurances against fire cover losses occasioned by the fault or negligence of the assured unaffected by any fraud or design. The affirmative has repeatedly been accepted as law

that case sparks from a brewery chimney were the cause of the burning of plaintiff's property. The question whether proper means have been taken to prevent the escape of sparks is for the jury; *Toledo, &c., Railroad Company v Pindar*, 5 Am. R. 57.

¹ *Holmes v. Midland Railroad of Canada*, 35 Upp. Can. Q. B. 253; *Jaffrey v. Toronto, Grey, and Bruce Railroad Company*, 23 Upp. Can. C. P. 553; *Port Glasgow, &c., Sailcloth Company v. Caledonian Railway Company*, 19 Rettie 608, 20 Rettie (H. L.) 38.

² *Philadelphia and Reading Railroad Company v. Hendrickson*, 21 Am. R. 97.

³ *Delaware Railroad Company v. Salmon*, 23 Am. R. 214, where there is a most exhaustive judgment; *Hammersmith Railway Company v. Brand*, L. R. 4 H. L. 171.

⁴ *Scott v. Hale*, 16 Me. 326; *Webb v. Rome, &c., Railroad Company*, 49 N. Y. 420 (the English cases are subjected here to an elaborate examination). In *Spaulding v. Chicago and North-Western Railway Company*, 11 Am. R. 550, a distinction is drawn between 6 Anne, c. 58 (c. 31 Ruffhead), s. 6, which is held to be part of the common law of America, and 14 Geo. III. c. 78, s. 86, which is there held not to apply at all. The opinion is also expressed that the construction of the Act is not to be made to include the liability of railway companies for fires caused by sparks from their engines; since nothing in the nature of a railway engine could have been within the contemplation of the framers of the statute. This method of construction is not tenable in England.

⁵ In addition to the cases already cited, see *Canada Southern Railroad Company v. Phelps*, 14 Can. S. C. R. 132.

⁶ *Columbia Insurance Company of Alexandria v. Lawrence*, 10 Peters (U. S.) 507. "It may be doubted," says Mr. Holmes, 3 Kent, Comm. (12th ed.), 376, n. 1 (g.) "whether any negligence, even of the assured in person not amounting to proof of a fraudulent intent to commit or permit an injury within the policy, would prevent a recovery."

both in England and America.¹ The conclusion is unassailable on general reasoning, since, says Story, J., "if such losses were not within such policies the indemnity against such risks would be practically of little importance; since much the larger numbers of fires of this sort may be traced back to some negligence, slight or otherwise, of the members of families."² The terms in which fire policies are drawn point to the same conclusion. By them the underwriters agree to pay "all loss or damage" sustained by the assured through fire on the insured property, while the exceptions against liability are specific, *e.g.*, against loss from fire sustained in consequence of "any invasion, civil commotion, riot, or any military usurpation"; earthquakes and hurricanes are also excluded. All other losses may therefore be construed to remain by force of the maxim *Expressio unius est exclusio alterius*. The general policy of the law excludes fraudulent losses, *allegans suam turpitudinem non est audiendus*.³ This conclusion Story, J., thus expresses: "We are, then, of opinion that a loss by fire occasioned by the mere fault and negligence of the assured or his servants or agents, and without fraud or design, is a loss within the policy, upon the general ground that the fire is the proximate cause of the loss; and also upon the ground that the express exceptions in policies against fire leave this within the scope of the general terms of such policies." Story, J.'s conclusion.

It may be added that the right of the insurer to be subrogated to the rights of the assured in respect of torts causing the injury insured against, is as available in case of an insurance against fire on land as in that of a marine policy.⁴ Subrogation.

The common law right to pull down a house to arrest a fire was asserted so far back as the reign of Henry VIII.⁵ when it was said, "If a fire be taken in a street I may justify the pulling down of the wall or house of another man to save the row from the spreading of the fire; but if I be assailed in my house in a Right to pull down a house to arrest a fire.

¹ In England *Shaw v. Robberds*, 6 A. & E. 75, per Lord Denman, at 84; *Dobson v. Sotheby*, 1 M. & M. 90, per Lord Tenterden, at 93; *Austin v. Drew*, 4 Camp. 360, per Gibbs, C.J., at 362; and *Busk v. Royal Exchange Insurance Company*, 2 B. & Ald. 73, may be cited. In the United States *Grim v. Phoenix Insurance Company*, 13 John (N. Y. Sup. Ct.) 451, was the leading authority previous to Story, J.'s, judgment.

² 10 Peters (U.S.) 507, at 517, 518.

³ 4 Co. Inst. 279, citing Rich. de Raynham's case, Y. B. Trin. 13 Ed. I., in *com. banco*.

⁴ *Castellain v. Preston*, 11 Q. B. Div. 380, per Bowen, L.J., at 403; *Darrell v. Tibbitts*, 5 Q. B. Div. 560; *Burnand v. Rodocanachi*, 7 App. Cas. 333; *Simpson v. Thomson*, 3 App. Cas. 279, at 284; *Mobile and Montgomery Railroad Company v. Jurey*, 111 U. S. (4 Davis) 584.

⁵ Y. B. 13 Hen. VIII., 16, per Shelley, J.; Y. B. 12 Hen. VIII., 10, per Brooke, J. Cp. Y. B. 21 Hen. VII., 27, pl. 5; Bacon, *Maxims*, Reg. 5; *Maleverer v. Spinke*, Dyer 35 a, 36 b; *Gedge v. Minne*, 2 Buls. 60, at 61 *arg.*; Bac. Abr. *Trespas*. (F.) See Metropolitan Fire Brigade Act, 1865, 28 & 29 Vict. c. 90; *Carter v. Thomas* (1893), 1 Q. B. 673, under 10 & 11 Vict. c. 89, s. 32, incorporated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), by s. 171 of the latter Act. As to rights of firemen in burning house, *Gibson v. Leonard*, 36 Am. St. R. 376.

city or town and distressed, and to save my life I set fire to mine own house which spreadeth and taketh hold upon other houses adjoining, this is not justifiable, but I am subject to their action upon the case, because I cannot rescue my own life by doing anything which is against the commonwealth. But if it had been but a private trespass, as the going over another's ground or the breaking of his inclosure when I am pursued for the safeguard of my life, it is justifiable."

Case of the
King's Pre-
rogative in
Saltpetre.

The law is similarly laid down in the case of the King's Prerogative in Saltpetre:¹ "For the commonwealth, a man shall suffer damage; as, for saving of a city or town a house shall be plucked down if the next door be on fire; and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action, as it is said in 3 Hen. VIII. fol. 5. And in this case the rule is true, *Princeps et respublica ex justa causa possunt rem meam auferre.*"²

Use of fire-
works.

Closely allied with the subject we have been discussing is that of the use of fireworks.

By the English law regulations are placed on their sale, both with regard to the place in which they are sold, which has to be licensed,³ and the person to whom they are sold, who is required to be not "apparently under the age of thirteen years," that is, if gunpowder enters into the constitution of the firework.⁴ And "if any person throw, cast, or fire any firework in or into any highway, street, thoroughfare, or public place, he shall be liable to a penalty not exceeding £5."⁵ If he were to injure any one when thus infringing the Act, his liability sufficiently appears from the well-known case of *Scott v. Shepherd*.⁶ Apart from the Act of Parliament, the explosion of fireworks in public places is wrongful at common law.⁷

Even where the explosion of fireworks is not unlawful the

¹ 12 Co. Rep. 13, Mouse's case, 12 Co. Rep. 63. In Pepys's Diary, under date Sept. 2nd, 1666, and succeeding days, are repeated entries indicating that this view of the law had practical effect given to it during the Great Fire of London; though the Lord Mayor was at first very lacking in resolution. "To the King's message (to spare no houses, but to pull down before the fire every way), he cried, like a fainting woman, 'Lord! What can I do? I am spent: people will not obey me. I have been pulling down houses; but the fire overtakes us faster than we can do it.'"

² See the question discussed as to the limits within which this may be done. Pufendorf, *Le Droit de la Nature et des gens*, liv. ii. ch. 6, sec. 8. Vin. Abr. Necessity (A.) 8; *Stone v. Mayor, &c., of New York*, 25 Wend. (N.Y.) 156; *Russell v. Mayor, &c., of New York*, 2 Denio (N.Y.) 461; *Bowdich v. Boston*, 101 U. S. (11 Otto) 16.

³ 38 Vict. c. 17, ss. 48, 49.

⁴ 38 Vict. c. 17, s. 31.

⁵ 38 Vict. c. 17, s. 80: see also 5 & 6 Will. IV. c. 50, s. 72.

⁶ 2 Wm. Bl. 892; 1 Sm. L. C. (9th ed.) 480.

⁷ *Conklin v. Thompson*, 29 Barb. (N. Y.) 218; see note to *Lincoln v. City of Boston*, 12 Am. St. R. 601.

greatest care must be used with them, and failure in this imports liability. In one case¹ Lord Ellenborough said that "if a master of a school, knowing that fireworks would be used, were to be guilty of negligence in not preventing the use of them, he would be amenable for the consequences," and was of opinion that an action would be maintainable if it were shewn that a schoolmaster had delivered out fireworks to boys, and that an accident had then occurred through the wilful misconduct of one of them. This is perhaps on an assumption that fireworks and boys are agencies dangerous in conjunction, however innocent apart, to which the words of Tindal, C.J., in *Vaughan v. Menlove*² are applicable: "Put the case of a chemist, mixing substances which alone are perfectly innocent, but which are liable to explode on coming into contact, and thereby occasioning damage to his neighbour, who could for a moment doubt that the injured party would have a remedy by action?"

Lord Ellenborough's view of a schoolmaster's liability with regard to fireworks given to schoolboys.

In Lord Ellenborough's view, as reported, fireworks must be taken to be necessarily dangerous, and to be kept from boys. The justness of this view must be dependent on age and circumstances. To supply a boy under thirteen years of age with fireworks would undoubtedly, *prima facie*, be an act rendering the schoolmaster or other person liable for the wilful mischief which he had supplied the means of the boy committing. If the boy were over sixteen and of a trustworthy character, the presumption would be the other way. In every case the peculiar circumstances would have to be considered.³ The proposition required to support Lord Ellenborough's position in its full extent is that the possession of fireworks by schoolboys is in all circumstances unlawful; and includes as well the youth waiting at school the time to commence residence at the university, and the last importation into the boys' department from among the infants at a Board school. While in so far as it imports that a schoolmaster guilty of negligence (negligence in law presupposing a legal duty) is liable for negligence, it merely affirms an identical proposition and is useless.⁴ The proposition attributed to Lord Ellenborough in its generality, at any rate, does not seem in accord with good sense.

Lord Ellenborough's view criticised.

The principles laid down in *Williams v. Eady*,⁵ though at first sight raising similar considerations, do not really lend countenance to the views attributed to Lord Ellenborough in the

Williams v. Eady.

¹ *King v. Ford*, 1 Stark. (N.P.) 421; *Williams v. Eady*, 9 Times L. R. 637, 10 Times L. R. 41 (C. A.).

² 4 Scott 244, at 252; 3 Bing. N. C. 468.

³ Cp. *Harris v. Cameron*, 29 Am. St. R. 891.

⁴ The Act of 9 Will. III. c. 7, had probably a material influence on the course of the case. It was repealed 23 & 24 Vict. c. 139, s. 1.

⁵ 10 Times L. R. 41 (C. A.).

report. It may well be the duty of a schoolmaster to keep dangerous chemicals out of the reach of his schoolboys, and yet there may be circumstances in which allowing them to let off a few squibs and crackers is wholly free from blame. Could it be said in the United States, for example, to be absolutely unlawful to allow a young boy to handle any description of firework on the 4th of July; or in England, on occasions of special festivity? If not, it must be conceded, not necessarily to follow, that the schoolmaster permitting his boys to have fireworks is liable for their wanton, mischievous, or reckless acts.

Lord Esher,
M.R.'s state-
ment of school-
master's duty.

Lord Esher, M.R.'s, statement of a schoolmaster's duty, may, with advantage be noted.¹ "The schoolmaster was bound to take such care of his boys as a careful father would of his boys." "Then he was bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts, and their propensity to meddle with anything that came in their way." All this is conclusive against immunity for leaving dangerous chemicals within their reach, though it does not negative the possibility of their lawfully assisting at a display of fireworks.²

Amount of
care requisite
in letting off
fireworks in a
lawful place
and on a law-
ful occasion.

Whitby v. Brock³ is a valuable authority on the amount of care to be used in the letting off fireworks in a lawful place and on a lawful occasion. Defendants were letting off fireworks for their own benefit in the Crystal Palace grounds, when plaintiff's wife, entering the Palace grounds, was struck on the leg by a firework and injured. Lord Esher, M.R., held that the mere occurrence of an accident was sufficient to warrant the Court leaving the question of negligence to the jury. And Lopes, L.J., referring to his judgment in Parry v. Smith,⁴ was of opinion that this case came under the principle there enunciated, that a duty to use the greatest care "attaches in every case, where a person is using or is dealing with a highly dangerous thing which, unless managed with the greatest care, is calculated to cause injury." The law is the same as that which regulates the use of firearms; "It was incumbent on him, who by charging the gun had made it capable of doing mischief, to render it safe and innoxious."⁵ Again, in an American case,⁶ the law was laid down with equal stringency that persons who take upon themselves the business of exploding fire-

¹ Williams v. Eady, 10 Times L. R. 41 (C. A.).

² As to the duty and liability of a schoolmaster, 1 Bl. Comm. 453; Fitzgerald v. Northcote, 4 F. & F. 656, per Cockburn, C.J., at 689, and reporters' note 663-669, Price v. Wilkins, 58 L. T. 680; Hutt v. Governors of Haileybury College, 4 Times L. R. 623.

³ 4 Times L. R. 241 (C. A.).

⁴ 4 C. P. D. 325.

⁵ Dixon v. Bell, 5 M. & S. 198.

⁶ Dowell v. Guthrie, 17 Am. St. R. 598.

works must exercise great care; and the care to be used was required "to be proportioned to the dangerous character of the explosives used and the danger to be apprehended from the use of them." In any event, after the occurrence of an accident through a dangerous agency—the mere fact of its occurrence, as we have seen, being *prima facie* evidence of negligence—it is for the jury to decide whether there has been "absence of care according to the circumstances";¹ and so where injury resulted from the storing of gunpowder the person responsible was held liable "even though the explosion is not chargeable to his personal negligence."²

Further, the circumstances may require very different degrees of care.³ "A hunter shooting in a wilderness is not bound to the caution of a person shooting in a populous neighbourhood."⁴ It is therefore matter for a jury whether, on any facts "from which negligence may be reasonably inferred" being established, negligence ought to be inferred from them;⁵ so that, in those cases, where the mere occurrence of an accident is sufficient *prima facie* evidence of negligence to go to a jury,⁶ it is left practically to a jury to decide what degree of diligence is to be required, subject, of course, to the direction of the judge, who should call their attention to the fact that there is no undeviating and cast-iron rule as to what is negligence, and that negligence is "absence of care according to the circumstances."

Within certain limits the verdict of a jury would be conclusive; but where they are shewn to have affixed liability by requiring a different degree of diligence from that which the law demands, their verdict would probably be set aside as not warranted by the evidence. Thus, if a man shot on the moors of Yorkshire were to bring his action, and it were to be shewn that every precaution was used customary for men out shooting, but notwithstanding this, the jury were to adopt for their standard of care that which should be adopted by a man carrying a gun down Fleet Street, the verdict would be set aside, because the jury had not applied their minds to the only relevant inquiry—"care according to the circumstances."

As the fact of injury happening is enough, in the absence of an answer, to entitle the plaintiff to recover, on the principle of *Res ipsa loquitur*.

¹ Per Willes, J., in *Vaughan v. Taff Vale Railway Company*, 5 H. & N. 679, at 688.

² *Laffin, & Co., Powder Company v. Tearney*, 19 Am. St. R. 34.

³ *Regina v. Hutchinson*, 9 Cox C. C. 555.

⁴ Wharton, *Negligence* (2nd ed.), § 882, citing *Bizzell v. Booker*, 16 Ark. 308.

⁵ *Metropolitan Railway Company v. Jackson*, 3 App. Cas. 193, per Lord Cairns, C. at 197.

⁶ Per Lord Esher, M.R., *Whitby v. Brock*, 4 Times L. R. 241 (C. A.).

Dublin, Wicklow, and Wexford Railway Company *v.* Slattery,¹ the determination of the evidence cannot in any case be withdrawn from the consideration of the jury, however overwhelming the circumstances pointing to exoneration from negligence may be. The defendant's remedy is, as just indicated, by application to the Court *in banc*; and the guiding consideration is whether the verdict is "such as reasonable men might find."²

¹ 3 App. Cas. 1155.

² Metropolitan Railway Company *v.* Wright, 11 App. Cas. 152.

CHAPTER IV.

FENCES AND PARTY-WALLS.

I. FENCES.¹

“A FENCE,” says Woolrych, “may consist of almost any kind of division or enclosure, but a hedge, ditch, or a wall will be most commonly found to answer that term.”²

In agricultural districts the most usual way of fencing is by hedge and ditch.

The rule with regard to the presumptive ownership of hedges and ditches is that, where adjacent fields are separated by a hedge and ditch, the hedge and ditch *prima facie* belong to the owner of the field that contains the hedge; for no man making a ditch can cut into his neighbour's soil; usually he cuts to the extremity of his own land, and is of course bound to throw the soil which he digs out upon his own land.³

If there are two ditches, one on each side of a hedge, or if there be a bank on each side of a ditch, or a bank without a ditch, then the ownership of the hedge, ditch, or bank must be ascertained by proving acts of ownership.⁴

By the common law the owner of land is under no obligation to fence.⁵ He is bound to see that his cattle do not stray into his neighbour's land, since if they do he is guilty of trespass.⁶

¹ See an article, *The Law Relating to Fences*, *Law Mag.* (1828), vol. i. 590; *Shearman and Redfield, Negligence* (4th ed.), §§ 655–664; *Wharton, Negligence* (2nd ed.) §§ 883–890.

² *Law of Fences*, 281. This does not seem to lay stress enough on palings, which have now become a primary sense of the word, though it certainly includes them.

³ Per Lawrence, J., *Vowles v. Miller*, 3 Taunt. 138; per Holroyd, J., *Doe dem. Pring v. Pearsey*, 7 B. & C. 304, per Holroyd, J., at 307; *Strang v. Steuart*, 4 Macph. (H. L.) 5.

⁴ Per Bayley, J., in *Guy v. West*, 2 Selwyn N. P. (13th ed.) 1244. As to the French law, see *Code Civil*, arts. 666–668.

⁵ This rule dates from the Year-books—*e.g.*, 20 Edward IV., fol. 10 b. cited and set out 17 C. B. N. S. 245, at 251 n, and considered in connection with the other authorities in the judgment of Blackburn, J., in *Fletcher v. Rylands*, L. R. 1 Ex. 265, at 280.

⁶ *Churchill v. Evans*, 1 Taunt. 529.

Bayley, J., in
Boyle v. Tam-
lyn.

In Boyle v. Tamlyn,¹ Bayley, J., lays down the law: "The general rule of law is, that a man is only bound to take care that his cattle do not wander from his own land, and trespass upon the lands of others. He is under no legal obligation, therefore, to keep up fences between adjoining closes of which he is the owner; and even where adjoining lands which have once belonged to different persons, one of whom was bound to repair the fences between the two, afterwards become the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership. And where the person who has so become the owner of the entirety afterwards parts with one of the two closes, the obligation to repair the fences will not revive, unless express words be introduced into the deed of conveyance for that purpose."²

Working out
of the legal
theory.

Though the law is thus, the effect of it in grazing countries at least is indistinguishable from what it would be were there an absolute obligation to fence. Bigelow,³ indeed, lays it down that "by the common law of England the owner of land is bound to keep it fenced," and cites Chancellor Kent as his authority for the proposition.⁴ In theory at least, the law is clearly otherwise, and there is no obligation to fence, though the natural effect of not fencing may involve a liability against which fencing is the only preventive.

Williams, J.,
in Cox v.
Burbidge.

Thus, Williams, J., in Cox v. Burbidge,⁵ says; "If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial." Again, in Ellis v. Loftus Iron Company,⁶ where there was an iron fence on the plaintiff's land, not-

Ellis v. Loftus
Iron Company.

¹ (1827) 6 B. & C. 329, at 337. See Y. B. 39 Edw. III. 3. If land be open to the highway and the beasts of a stranger enter upon the land, it is not justifiable. Otherwise, if cattle in passage on the highway eat herbs or corn, *raptim et sparsim*, against the will of the owner, it will excuse the trespass: Com. Dig. Trespass (D.) Droit. (M. 2); 1 Wms. Saund. 322 n (c).

² See Lawrence v. Jenkins, L. R. 8 Q. B. 274. As to strips of land adjoining a road, Doe dem. Pring v. Pearsey, 7 B. & C. 304; Simpson v. Dendy, 8 C. B. N. S. 433; Dendy v. Simpson, 18 C. B. 831; Jones v. Williams, 2 M. & W. 326; Vin. Abr. Fences.

³ L. C. on Torts, 490.

⁴ 3 Kent, Comm. 438. The passage is: "The doctrine is, that at common law the tenant of a close was not bound to fence against an adjoining close, unless by force of prescription; and, if bound by prescription to fence his close, he was not bound to fence against any cattle but such as were rightfully in the adjoining close. If not bound at common law to fence his land, he was nevertheless bound, at his peril, to keep his cattle on his own grounds, and prevent them from escaping."

⁵ 13 C. B. N. S. 430, at 438, cited and approved by Blackburn, J., Fletcher v. Rylands, L. R. 1 Ex. 265, at 281.

⁶ L. R. 10 C. P. 10; Lee v. Riley, 18 C. B. N. S. 722—mare trespassed into a field of defendant's; there was a question also of remoteness of damages.

withstanding which, a horse of the defendants' did damage to a horse of the plaintiff's through the fence, "It seems to me," said Lord Coleridge, "sufficiently clear that some portion of the defendants' horse's body must have been over the boundary. That may be a very small trespass, but it is a trespass in law;" and Brett, J.:¹ "For a time I doubted whether, if the animal strayed upon the plaintiff's soil without negligence on the part of the defendants, a trespass would have been committed. However, upon reference to the authorities, I find that the owner of an animal, although he may be guilty of no default, is liable to be sued in trespass if he strays on to another's ground. A passage in 3 Black. Com. chap. xii. p. 211, might perhaps cause a little hesitation; the writer there says that 'a man is answerable, not only for his own trespass, but that of his cattle also'; but he then proceeds to speak of 'negligent keeping.' The language is not quite decisive. If, however, we refer to Com. Digest, Trespass, C 1, and 1 Chitty, on Pleading, pp. 93, 202 (7th ed.) we shall find that the owner is liable in trespass if cattle stray upon another's land, although he himself commits no fault."

A distinction must be taken, for the liability of a landowner for what escapes from his land is not absolute. Thus, in Comyns's Digest² it is laid down: "If a man has a tame fox, which escapes, and becomes wild and does mischief, the owner shall not answer for the damage done afterwards: per Twisden, J., 1 Ventris 295." Distinction.

Hale,³ however, has the following: "These things seem to be agreeable to law." Hale, in his History of the Pleas of the Crown.

"1. If the owner have notice of the quality of his beast, and it doth anybody hurt, he is chargeable with an action for it."

"2. Though he have no particular notice, that he did any such thing before, yet if it be a beast, that is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in Andrew Baker's case, whose child was bit by a monkey that broke his chain and got loose.⁴

"And therefore, in case of such a wild beast, or in case of a bull or cow, that doth damage, where the owner knows of it, he must at his peril keep him safe from doing hurt, for though he

¹ 44 L. J. C. P. 24, at 26; the report in the Law Reports is neither so clear nor so full.

² Action upon the Case for Negligence (A 5). The case referred to is *Mitchell v. Alestree*, 2 Lev. 172, and the authority for Twisden, J.'s, statement is *Weaver v. Ward*, Hob. 134. Most of the cases are cited in *Read v. Edwards*, 17 C. B. N. S. 245.

³ History of the Pleas of the Crown, vol. i. 430.

⁴ See *May v. Burdett*, 9 Q. B. 101.

use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages."

Bramwell, B.,
in *Nichols v.*
Marsland.

Again, in *Nichols v. Marsland*,¹ Bramwell, B., says: "I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable."

Cases con-
sidered.

To reconcile these *dicta* it is necessary to draw into prominence the distinction between animals natural to the country and animals brought in for the convenience or pleasure of their captors. A fox breaking its chain merely resumes its natural state in a country where other foxes exist; so, too, of hares, partridges, or pheasants. A monkey escaped, or a lion, or a bear, is a dangerous agency which of its own nature would not have been a peril to the neighbourhood, had it not been imported there. The distinction is between the introducing a new means of mischief and then permitting it to get free, and arresting an existing mischief to the ravages of which property is naturally subject, and which after an interval resumes its natural course. Could it be shewn that by reason of the temporary confinement damage of a special character was done, there seems no reason why liability would not attach. The case of the tiger put by Bramwell, B., may assist to illustrate the rule. In this country the person responsible for the presence of the tiger would be liable for its escape. In India the proprietor of a territory acquired for tiger-shooting, having captured and confined a tiger, would not be liable for the ravages done on its escape, because the liability for tigers is an incident of property thereabouts, and the escape of one merely restores the condition of things before the capture, and so imposes no liability. This consideration is applicable to and explains the rule of the civil law: *Si ursus fugerit a domino et sic nocuerit, non potest quondam dominus conveniri quia desiit dominus esse ubi fera evasit*.² Bears are indigenous over all the region where the civil law prevailed.³

Duty towards
neighbour's
cattle.

The difference, between the liability alleged to exist in Bigelow's "Leading Cases on the Law of Torts,"⁴ and that which the law actually imposes, is of importance when we consider the position of a landowner with regard to his neighbour's cattle. If there were a liability to fence, then, in default of fencing, injury happening to his neighbour's cattle would import a right of action to the neighbour. Unless by prescription, or through the force of an agreement, no such liability exists. This appears from

¹ L. R. 10 Ex. 255, at 260.

² Inst. 4, 9.

³ Encyclopædia Britannica (9th ed.), Bears.

⁴ *Ante*, 608.

Williams's Notes to Saunders:¹ "It must be observed that the general rule of law is that I am bound to take care that my beasts do not trespass on the land of my neighbour, and he is only bound to take care that his cattle do not wander from his land and trespass on mine; 6 Mod. 314, *Tenant v. Goldwin*. 1 Taunt. 529, *Churchill v. Evans*, 6 B. & C. 337. *Boyle v. Tamlyn*, 9 D. & R. 430, S. C.; and therefore, this kind of action [i.e., an action on the case for not repairing a fence] will only lie against a person who can be shewn to be bound by prescription or special obligation to repair the fence in question for the benefit of the owner or occupier of the adjoining land. And no man can be bound to repair for the benefit of those who have no right."

Williams's
Notes to
Saunders.

Where, then, an action has been held maintainable for an accident to the plaintiff's cattle by reason of defective fences on the defendant's land, the liability to repair the fences was either admitted, as in *Rooth v. Wilson*;² or was apparent from the terms of the holding, as in *Firth v. Bowling Iron Company*;³ or was proved, as in *Boyle v. Tamlyn*;⁴ or was presumed, as in *Lawrence v. Jenkins*,⁵ from the fact that fences had been kept in repair, at the request of the neighbours, by the occupiers of the land sought to be charged. A twenty years' repairing in this manner will raise a presumption of liability, capable of being rebutted by proof that the party whose tenants repaired were under disability, or were merely tenants for life; if the proof be that repairs have been uniformly done for forty years, the prescription will be conclusive.⁶ The fact of repair, unaided by other circumstances, will not be sufficient; it must also be shewn that such repairs have been made upon the requisition from time to time of the persons claiming the easement, or at least sufficient must be shewn to warrant a jury making such a presumption.⁷

Cases of
liability to
repair fences
examined.

If unfenced land adjoins a highway the owner of cattle travelling along the highway is not liable, negligence being out of the way, for damage done by his cattle in straying into unfenced land.⁸ This is an exception to the general law requiring a man to keep his cattle on his own land, or, more accurately, to keep them off his neighbour's, and is made probably for the purpose of facili-

Unfenced
land adjoining
a highway.

¹ *Pomfret v. Ricroft*, 1 Wms. Saund. 321, at 322a, n. (c).

² 1 B. & Ald. 59.

³ 3 C. P. D. 254; *Bush v. Brainard*, 1 Cowen (N. Y.) 78; *Blood v. Spaulding*, 57 Vt. 422, cited *Shearman and Redfield, Negligence* (4th ed.), § 661.

⁴ 6 B. & C. 329, 9 D. & R. 403.

⁵ L. R. 8 Q. B. 274.

⁶ 2 & 3 Will. IV. c. 71. Cp. *Gale, Law of Easements* (6th ed.), 176-190 and 454-464; *Gibbons, Law of Dilapidations*, 264.

⁷ *Lawrence v. Jenkins*, L. R. 8 Q. B. 274.

⁸ *Goodwyn v. Cheveley*, 4 H. & N. 631; *Tillett v. Ward*, 10 Q. B. D. 17.

tating commerce. As long ago as 22 Edward IV.¹ Catesby, J., said: "If one drive a herd of cattle along the highway where trees or wheat or any other kind of corn is growing, I say that if one of the beasts take a parcel of the corn, if it be against the will of the driver, he may well justify, for the law will intend that a man cannot govern them at all times as he would. But if he permitted them or continued them, then it is otherwise." And if the cattle are on the highway, not for passage, but to graze, such user is unlawful; for the public rights on a highway are only to pass and repass thereon, and the owner of cattle is liable for an entry of them in those circumstances on land adjoining the highway. The party who would take advantage of fences being out of repair as an excuse for his cattle escaping from a way into the land of another must shew that he was lawfully using the easement when the cattle escaped; for it is no excuse that the fences were out of repair if the cattle were trespassers in the place from whence they immediately came.²

Sufficiency of fences where there is an obligation to fence.

With this exception, the law is absolute. Assuming, however, the obligation to fence, the sufficiency of the fence erected in discharge of the obligation is a matter for the jury, who have to say whether the fence was such as an adjoining landowner using his land according to the accustomed course of farming has a right to have.³ It is not to be "a fence so close and strong that

¹ Y. B. 22 E. IV. 8 pl. 24.

² *Dovaston v. Payne*, 2 H. Bl. 527, 2 Sm. L. C. (9th ed.) 154. An entry on another's land may be justified in cases of necessity (as if a man who is assaulted and in danger of his life run through the close of another to escape) or to recover property carried on another's ground by force of the elements (as if the fruit of A's tree fall on B's land), Bac. Abr. Trespass (F); Vin. Abr. Tres. (Ha. 2). But if a tree had fallen on another's land through the owner's cutting it, he could not justify an entry, *Anthony v. Haney*, 8 Bing. 186, at 192. "If a man take my goods and carries them into his own land, I may justify my entry into the said land to take my goods again, for they came there by his own act." Vin. Abr. Tresp. (I. a) 9, adopted *Patrick v. Colerick*, 3 M. & W. 483, distinguishing 3 Bl. Comm. 4, cited by Tindal, C.J., *Anthony v. Haney*, *supra*. As to trees growing near a boundary line, it was held in *Masters v. Pollie*, 2 Roll. Rep. 141, that though nearly an equal portion of the roots may grow into the adjoining land, the tree belongs to the owner of the land in which the trunk is. Holt, C.J., in *Waterman v. Soaper*, 1 Ld. Raym. 737, at *nisi prius* held the adjoining owners tenants in common, though if all the roots grew in one man's land and the branches overshadowed the others the roots drew to themselves the ownership of the branches and the property in the tree. In *Holder v. Coates*, M. & M. 112, the test was said to be in whose land was the tree first planted. In the Civil Law the property is in common, Inst. 2, 1, 31. The whole subject is well considered in *Lyman v. Hale*, 11 Conn. 177, which decides that he, in whose land the trunk is, is the owner, and his neighbour a trespasser if he meddles with any of the overhanging fruit. See also Vin. Abr. Trees. "If the branches of your tree overhang my land I may lawfully cut them but I cannot justify cutting them before they overhang my land for fear of their overhanging." (*Norris v. Baker*, 1 Roll. Rep. 393, per Croke, J., at 394; *Earl of Lonsdale v. Nelson*, 2 B. & C. 302, per Best, J., at 311) without giving any previous notice to the owner of the tree. *Lemmon v. Webb*, 10 Times L. R. 467 (C. A.). To allow trees to grow over a river so as to hinder the navigation is a nuisance, Bro. Abr. Presentments in Courtes, pl. 11.

³ *Bessant v. Great Western Railway Company*, 8 C. B. N. S. 368; *Wiseman v. Booker*, 3 C. P. D. 184.

no pig could push through it, or so high that no horse or bullock could leap it. One could scarcely reach the limits of such a requirement, for the strength of swine is such that they would break through almost any fence, if there were a sufficient inducement on the other side." The obligation is no more than to put "up such a fence that a pig, taking that as the example, not of a peculiarly wandering disposition, nor under any excessive temptation will not get through it."¹

With regard to the public, it is so notoriously the duty of the actual occupier to repair the fences, and so little the duty of the landlord, that, without any agreement to that effect, the landlord may maintain an action against his tenant for not doing so.² This presumption does not exclude agreements between the landlord and tenant, the benefit of which against the landlord may be taken by any third person cognizant of their existence.³

At common law the owner of land, if bound to fence at all, is only bound to do so against cattle rightfully on the adjoining land.⁴ If the owner of such adjoining land happen to be a gratuitous bailee of a horse injured by the neglect to fence, he can recover;⁵ since beneficial ownership is not necessary.

We are next to consider the statutory obligation to fence.

By section 10 of the Railways Regulation Act, 1842,⁶ it is enacted that all railway companies shall be under the same liability of obligation to erect and to maintain and repair good and sufficient fences throughout the whole of their respective lines as they would have been if every part of such fences had been originally ordered to be made under an order of justices by virtue of the provisions to that effect in the Acts of Parliament relating to such railways respectively.

And by section 68 of the Railways Clauses Consolidation Act,⁷

¹ Per Bramwell, B., *Child v. Hearn*, L. R. 9 Ex. 176, at 182. "I agree that the company are not bound to fence against animals of extraordinary capacities, or under unusual conditions; but they must have a fence sufficient against ordinary cattle": per Piggot, B., at 183. Cp. *M'Ilvaine v. Lantz*, 100 Pa. St. 586.

² *Cheetham v. Hampson*, 4 T. R. 318.

³ *Payne v. Rogers*, 2 H. Bl. 349; *Nelson v. Liverpool Brewery Company*, 2 C. P. D. 311.

⁴ *Fitzherbert, De Natura Brevium*, 128, n. (a), cited by Jervis, C.J., and set out in *Ricketts v. East and West India Docks, &c. Company*, 12 C. B. 160, at 171; 1 Wms. Saund. 321, cited by Jervis, C.J., *Manchester, Sheffield, and Lincolnshire Railway Company v. Wallis*, 14 C. B. 213, at 218. In *Rust v. Low* 6 Mass. 90, it is pointed out by Parsons, C.J., that Hale's note to Fitzherbert, cited *supra*, is inaccurate. The history of this judgment is curious, and is given in *Story's Life and Letters*, vol. i. 116-118. Where the obligation to fence exists the obligation exists irrespective of any particular purpose to which the owner puts any portion of his land—*e.g.*, the obligation is not discharged if he uses his lands immediately adjoining the lands that should be fenced as arable land, and his cattle stray from their meadows across the arable land and come to mischief through the fencing being defective against their incursion.

⁵ *Rooth v. Wilson*, 1 B. & Ald. 59.

⁶ 5 & 6 Vict. c. 55.

Occupier's
duty to repair.

Duty to fence
only against
adjoining
owner.

Obligation to
fence by
statute.
Railways
Regulation
Act, 1842.

Railways
Clauses Act,
1845.

1845,¹ railway companies are bound to supply sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass or the cattle² of the owners or occupiers thereof from straying thereout by reason of the railway, together with all necessary gates made to open towards such adjoining lands, and not towards the railway, and all necessary stiles.

This section, says Jervis, C.J., in *Manchester, Sheffield, and Lincolnshire Railway Company v. Wallis*,³ "was plainly intended as a substitute for" the earlier provision.

Sharrod v. London and North-Western Railway Company.

Fawcett v. York and North Midland Railway Company.

The first reported case, *Sharrod v. London and North-Western Railway Company*,⁴ went off on the point that the action had been framed in trespass instead of on the case. This was followed by *Fawcett v. York and North Midland Railway Company*,⁵ brought on section 9 of the earlier Act,⁶ whereby an obligation was imposed on railway companies to keep the gates at the ends of level crossings closed against all persons or cattle upon the highway; the Court held that "that imposes an obligation to keep them closed as against everything, whether straying or passing," and that a company not performing this obligation is liable to an action for its breach of duty.⁷

Ricketts v. East and West India Docks, &c. Company.

This decision was strongly insisted on in *Ricketts v. East and West India Docks, &c. Company*,⁸ which was brought under section 68 of the Railways Clauses Act, 1845. The company were bound to make and maintain fences in the terms of the statute. The plaintiff was the owner of a close adjoining a close belonging to the Great Northern Railway Company, which abutted upon the defendants' railway; the plaintiff was bound to repair the fences of his own close. By the defect of his own fences plaintiff's sheep escaped into the adjoining close and then passed to the defendant's railway, and, in consequence of the want of a fence between it and the railway, were killed. There was no allegation of negligence. The Court decided that where an obligation to fence existed under the common law, that obligation was limited to the benefit of adjoining owners, and that "the

¹ 8 & 9 Vict. c. 20.

² Cattle—Beasts or quadrupeds in general serving for tillage or other labour, and for food to man. The word is said to include "perhaps swine": Webster. Cattle—Kine, horses, and other animals appropriated to the use of man: Richardson. In *Child v. Hearn*, L. R. 9 Ex. 176, the word "cattle" was held to include pigs.

³ 14 C. B. 213, at 220.

⁴ 4 Ex. 580.

⁵ 16 Q. B. 610.

⁶ 5 & 6 Vict. 55.

⁷ Per Patteson, J., at 618.

⁸ 12 C. B. 160; *Monklands Railway Company v. Waddell*, 23 Dunlop 1169, decides that the law in Scotland does not differ.

statute had most properly taken the common law rule as the measure" of railway companies' liability.

We have already seen that whilst cattle are passing along a highway, the owners of such cattle are using it according to the dedication of the owner of the soil, and that if, therefore, whilst passing along the road they stray into an adjoining field, the owner of the field cannot distrain them damage feasant if he were bound to keep up the fence against the road. If, instead of passing along the road, the cattle had strayed there, they might, supposing them to have escaped into an adjoining close, be distrained damage feasant, even although the owner of the close was bound to repair the fence between his close and the road; because the cattle were wrongfully on the road, and the owners were not occupying it so as to cast any obligation to repair upon the distrainer.¹

This distinction is observed in the cases fixing the import of a railway company's statutory liability to fence. In *Manchester, Sheffield, and Lincolnshire Railway Company v. Wallis*²—Straying cattle. plaintiff's horses strayed on the highway which ran alongside the railway, and through defect of the fences of the defendant company got upon the railway and were killed. The Court held that the plaintiff could not recover, as his horses were not rightfully using the highway, and there was no obligation on the defendants to maintain a fence against them. The distinction between this case and *Fawcett v. York and North Midland Railway Company*³ was pointed out to be that *Fawcett's* case was decided on another section,⁴ by which an unqualified duty was imposed on the company to keep constantly closed gates across any turnpike road or public carriage road on a level; while the 68th section had been decided, in *Rickett's case*,⁵ to impose no more than the common law obligation to keep up the fences against the cattle of the owners or occupiers of the adjacent land. Cresswell, J., instanced the case of *King v. Pease*⁶ as "a strong authority to shew that the Legislature having legalised railways, they are not subject to any liability beyond the ordinary common law liability, except where the Legislature has thought fit to impose it."

The duty imposed by section 47 formed the subject of decision

¹ *Dovaston v. Payne*, 2 H. Bl. 527.

² 14 C. B. 213, designated by Lord Esher, M.R., in *Charman v. South-Eastern Railway Company*, 21 Q. B. Div. 524, "a strong decision, but it was the decision of a very strong Court." "It is useless," he added, "now to cavil at that decision, and I think no Court of Appeal ought to interfere with it and the cases that followed it." Cp. *Duncan v. Canadian Pacific Railway Company*, 21 Ont. R. 355.

³ 16 Q. B. 610.

⁴ 5 & 6 Vict. s. 47.

⁵ 12 C. B. 160.

⁶ 4 B. & Ad. 30.

Charman v.
South-Eastern
Railway
Company.

in *Charman v. South-Eastern Railway Company*.¹ Horses of the plaintiff strayed upon a road leading from a common across the defendants' railway, which it crossed at a level. The road was divided from the railway by properly constructed gates; beyond the limit of the road, on a triangular piece of ground belonging to the defendants, was a swing gate for the use of foot passengers. One of the posts was rotten, and a defect in the fencing was thereby caused, through which the horses made their way and were killed. The 68th section of the Act was not applicable, because the horses were straying.² The wider provisions of the 47th section were, it was contended, not applicable, because the duty of the company (possibly absolute as far as it extended) extended only so far as the breadth of the road, and since in this case the protection was afforded for the total breadth of the road, and the defect was off the road, it was urged that the statutory duty did not apply. The Court of Appeal would not accept this view. The duty imposed on the company by the section being to protect cattle going along the road, the gates constructed in accordance with the provisions of the section may never be narrower than the road, yet for the discharge of the duty upon the railway company may be required to be wider; for the object of the section is "to prevent cattle using the road as a road of passage from entering upon the railway." Lord Esher, M.R., gave his view of the section as follows:³ "I think that the company are bound to make the gates, not merely the width of the road, but of such a width that when they are closed they will fence in the railway so as to prevent cattle or horses, which are using the road as a road of passage, and acting as cattle or horses naturally would act upon such a road, from entering 'on the railway'—not merely from entering on the level crossing—but from entering on the railway, and, whatever the width of the road, if it is necessary to do so in order to give that protection, the gates must be wider than the road. To say, however, that the company would be obliged to make a fence a quarter of a mile long, or even a hundred yards long—something which no one could call a gate—would be absurd and unreasonable." In the case before the Court it was held on the facts that the company had not discharged this obligation.

Judgment
of Lord
Esher, M.R.

Dawson v.
Midland
Railway
Company.

We have seen that, at common law, an adjoining owner can recover from a neighbouring proprietor bound to fence for damage caused by negligence to a horse of which he was gratuitous bailee.⁴ *Dawson v. Midland Railway Company*⁵ was

¹ 21 Q. B. Div. 524.

² *Manchester, Sheffield, and Lincolnshire Railway Company v. Wallis*, 14 C. B. 213.

³ 21 Q. B. Div. 524, at 530.

⁴ *Rooth v. Wilson*, 1 B. & Ald. 59.

⁵ L. R. 8 Ex. 8.

a somewhat similar case, but under the Act. The licensee of the occupier¹ of land adjoining the defendants' railway sued for injury to his horse, which was allowed to graze on the land, and managed to get through a defective fence on the defendants' line, and was killed. Kelly, C.B.'s judgment went on the ground that "the plaintiff's horse was lawfully in the field, from which it escaped through defect of the defendants' fences." Bramwell, B., said, "the statute appears to me to be for the benefit of all persons who are lawfully using adjoining land." The term cattle of occupiers used in the Act must, then, be taken to include the cattle of all persons who are lawfully upon lands adjacent to a railway, and the liability cast on the company by the Act is "very much like the old prescriptive liability to fence."²

An unsuccessful effort was made in *Midland Railway Company v. Daykin*³ to contend that a colt that had strayed on the high-way, and which the owner's servants were in the act of driving home, when, by the negligence of the company's servants, it got upon the railway, was within this rule. The Court, however, was clear as to the liability of the railway company.

The cases of *Roberts v. Great Western Railway Company*⁴ and *Marfell v. South Wales Railway Company*⁵ remain for consideration. In the former, plaintiff sued for the loss of some cattle which were sent by railway, and on arriving at their destination were removed from the truck into a yard belonging to the company adjoining the railway, though not fenced therefrom. The cattle, being frightened, rushed on to the line and were killed. The plaintiff sued for negligence, alleging that the company had negligently omitted to fence the yard from the railway. The defendants denied their obligation to fence either by statute or at common law. The Court was of opinion that no legal liability was "cast upon the company to make or maintain any fence between their station yard and the railway."⁶

In the latter case⁷ a railway and a tramway ran in parallel lines each on the land of the railway company. The plaintiff was using the tramway with horses and trucks by permission of the defendants, and was paying toll for the privilege. A fence had been placed between the railway and the tramway, in which

¹ The Act is for the protection of "the cattle of the owners or the occupiers."

² Per Lopes, J., *Wiseman v. Booker*, 3 C. P. D. 184, at 189.

³ 17 C. B. 126.

⁴ 4 C. B. N. S. 506.

⁵ 8 C. B. N. S. 525.

⁶ Cp. *Covington Stock-yards Company v. Keith*, 139 U. S. (32 Davies) 128, where a railway company holding itself out as a carrier of livestock is held to be under an obligation to provide suitable and necessary facilities for receiving and discharging livestock sent to or forwarded by them.

⁷ *Marfell v. South Wales Railway Company*, 8 C. B. N. S. 525.

fence was a gate which had been left open by the defendants' servants. The evidence was that plaintiff had never seen the gate shut. Through the opening thus left, plaintiff's horse swerved through fear on the railway and was killed. It was sought to put the defendants' liability on two grounds—first, that the company were liable under section 68; and secondly, failing that, at common law. The Court was agreed that there was no liability under the first head. "It is clear," said Erle, C. J., "that the defendants are under no obligation to put any fence on their own land." The Chief Justice was also of opinion that there was no evidence of common law negligence, "for if it [*i.e.*, the gate] was always open, there would be no ground for inferring a contract for keeping it shut; and upon the notes the plaintiff states that he never saw the gate shut." The majority of the Court,¹ however, thought that the defendants, having constructed a fence with a gate, were bound to use some care in the use of the gate; and sustained the verdict for the plaintiff.

Cases dis-
criminated.

The case may be distinguished from *Roberts v. Great Western Railway Company*, since, in *Marfell's* case, the defendants professed to adopt precautions, in the use of which they were bound to some degree of care, which obligation they failed to discharge; while in *Roberts's* case the railway company left their premises without any affectation of precautions, and by law they were not bound to adopt any. Having undertaken a duty, they were bound to use some care in the discharge of it, though there was no legal obligation which could at first hand have constrained them to undertake it.² The principle on which they are agreed is that the statute imposes no obligation on a railway company to fence a portion of their own lands against some other portion.

Wiseman v.
Booker.

The neglect of a railway company efficiently to perform their obligations in *Wiseman v. Booker*³ enured to the detriment of their own tenant. The company let some of their land to a tenant, who planted it with vegetables, which were consumed by horses on the defendant's lands adjoining putting their heads over the fence that the railway company had set up in assumed discharge of their statutory obligation. On action being brought by the tenant, the defendant set up that the fence erected by the plaintiff's landlord was insufficient, and this objection was sus-

¹ Williams and Byles, JJ.

² "If a person undertakes to perform a voluntary act he is liable if he performs it improperly, but not if he neglects to perform it. Such is the result of the decision in the case of *Coggs v. Bernard*": per Willes, J., *Skelton v. London and North-Western Railway Company*, L. R. 2 C. P. 631, at 636.

³ 3 C. P. D. 184.

tained. Lindley, J., thus interprets the language of the section : Interpretation of the section by Lindley, J.
 “The fence is to be for the benefit of the owner or occupier of the adjoining lands. The structure is to be sufficient to keep the cattle of the adjoining owners from straying on to the land of the company. The horses here were straying within the fair meaning of those words; and this it was the duty of the company to prevent. Suppose the company had after erecting such a fence as here described, planted yew-trees so near to it as to be within reach of the cattle of the adjoining owner, and they had eaten and died, would not the company have been responsible for their loss within the principle of the decision in *Ellis v. Loftus Iron Company* ?”

At the end of section 68 of the Railway Clauses Act, 1845, there is a proviso that a company shall not be required to make the fences or other works in the section provided for, if “the owners and occupiers of the land shall have agreed to receive, and shall have been paid, compensation instead of the making them.” Proviso to section 68 of Railway Clauses Act, 1845, considered in *Corry v. Great Western Railway Company*. The effect of this was considered in *Corry v. Great Western Railway Company*.² Plaintiff was tenant from year to year. During his tenancy some of his lands were taken, and an arrangement made with his landlord, the effect of which deprived the landlord of the right of insisting upon either the original making or the maintaining any such fence as the 68th section provided for. Posts and rails that the railway had originally put having decayed, the railway company, in consequence of their arrangement with the landlord, did not repair them, and a cow of the plaintiff’s was killed in consequence. On an action being brought, the defendants set up their agreement with the landlord; notwithstanding this, it was held, in both the Divisional Court and in the Court of Appeal, that the landlord could not be taken to have given up any right which the plaintiff had as his tenant, because “the plaintiff was no party to the agreement by which his landlord gave up the right of fencing.” It was intimated,³ however, that “a person who acquired a fresh tenancy after the owner had given up his right to the accommodation works, could not enforce such a demand as is made by the plaintiff in the present action.” The case would then have resembled *Wiseman v. Booker*⁴ in so far as the plaintiff would not have been allowed to have set up a higher right than that of his lessor. The facts are so peculiar that such a case is extremely unlikely to recur.

The company’s obligation under section 68 is limited to

¹ L. R. 10 C. P. 10.

² 6 Q. B. D. 237, 7 Q. B. Div. 322.

³ Per Baggallay, L.J., 7 Q. B. Div. at 327.

⁴ 3 C. P. D. 184.

owners and occupiers of adjoining land, and therefore the want of fencing cannot be alleged as negligence by a mere passenger on the railway.¹

II. PARTY WALLS.²

The law as to party walls remains to be noticed briefly.

Fry, J., in
Watson v.
Gray as to
meaning of
term "party
wall."

In *Watson v. Gray*, Fry, J., says:³ "The words [party-wall] appear to me to express a meaning rather popular than legal, and they may, I think, be used in four different senses. They may mean, first, a wall of which the two adjoining owners are tenants in common, as in *Wiltshire v. Sidford*⁴ and *Cubitt v. Porter*.⁵ I think that the judgments in those cases shew that that is the most common and the primary meaning of the term. In the next place, the term may be used to signify a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners, as in *Matts v. Hawkins*.⁶ Then, thirdly, the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. The term is so used in some of the Building Acts. Lastly, the term may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favour of the owner of the other moiety."⁷

1. Case of
tenants in
common of
the wall.

1. If the adjoining owners are tenants in common, one cannot maintain an action for trespasses not amounting to an ouster, because all have equal rights of possession and property.⁸ If the act amounts to an ouster, an action will lie, as if the common property is destroyed or a chattel appropriated.⁹

The old rule of law, as illustrated by the judgment of Littledale, J., in *Cubitt v. Porter*.¹⁰ was that trespass would not lie between co-tenants for anything short of a destruction of the common property. The doctrine now adopted, as laid down in

¹ *Buxton v. North-Eastern Railway Company*, L. R. 3 Q. B. 549. See, however, 5 & 6 Vict. c. 55 s. 10, which has never in terms been repealed, though Jervis, C.J., in *Manchester, Sheffield, and Lincolnshire Railway Company v. Wallis*, 14 C. B. 213, at 220 (*ante*, 614), says section 68 of 8 & 9 Vict. c. 20 is substituted for it. In some States of the American Union neglect by a railway to fence when they have the power is visited by damages of double the value of any stock killed by straying on the line, *Minneapolis Railway Company v. Beckwith*, 129 U.S. (22 Davis) 26.

² *Hunt on Boundaries*, ch. v.

³ 14 Ch. D. 192, at 194. Cp. *Mayfair Property Company v. Johnston* (1894), 1 Ch. 508.

⁴ 1 M. & Ry. 404, 8 B. & C. 259 n.

⁵ 8 B. & C. 257.

⁶ 5 Taunt. 20.

⁷ See note to *Wiltshire v. Sidford*, 1 M. & Ry. 404, at 408.

⁸ *Wilkinson v. Haygarth*, 12 Q. B. 837.

⁹ *Jacobs v. Seward*, L. R. 5 H. L. 464.

¹⁰ 8 B. & C. 257, at 267.

Murry *v.* Hall,¹ is that trespass will lie by a co-tenant against a co-tenant for an ouster.

2. If the adjoining owners are entitled each to a strip of half the thickness of the wall, because half is on the land of one and half on the land of the other, "each party, for any injury done to the part which stands on his own land must have the ordinary remedy."²

2. Case of adjoining owners each having half the wall.

3. If the wall belongs to one owner, and the other has easements over it, then the owner of the dominant tenement is entitled to put any amount of weight on the wall that does not endanger its stability.³

3. Case of one adjoining owner having ownership of the wall over which the other has an easement.

4. If the ownership of the wall is in moieties, each being subject to a cross easement, then each is similarly entitled to put any amount of weight on the wall; and each party, for any injury done to the part which stands on his own land (subject to the easement), must have the ordinary remedy.

4. Case of cross easements.

Under the Metropolitan Building Act, 1855,⁴ different considerations come into being. "Whatever the rights at common law might have been, such right no longer exists."⁵ The object of the Act is to limit the acts of private owners for the general benefit of the public, to prevent the spread of fire, and for similar purposes. In order to determine whether a wall is a party-wall, it is not necessary to consider what rights of ownership the plaintiff and defendant have, but what is the physical condition, position, and user of the wall.⁶

Effect of Metropolitan Building Act, 1855, on the law.

Sec. 3⁷ provides that "party-wall shall apply to every wall used or built in order to be used as a separation of any building from any other building with a view to the same being occupied by different persons."

Metropolitan Building Act, 1855.

The question of ownership, therefore, becomes of small account; and when the circumstances of condition, position, and

¹ 7 C. B. 441. Com. Dig. Estates, by Grant (K. 8).

² *Matts v. Hawkins*, 5 Taunt. 20, per Mansfield, C.J., at 23. See also *Bradbee v. Christ's Hospital*, 4 M. & G. 714, at 760, 761.

³ *Sheffield Improved Industrial, &c. Society v. Jarvis*, W. N. 1871, 208, 1872, 47.

⁴ 18 & 19 Vict. c. 122. This Act is superseded as to party walls and repealed by the London Building Act, 1894, Part viii.

⁵ Per Jessel, M.R., *Standard Bank of British South America v. Stokes*, 9 Ch. D. 68, at 73.

⁶ Per Fry, J., *Knight v. Pursell*, 11 Ch. D. 412, at 415.

⁷ 18 & 19 Vict. c. 122. See now London Building Act, 1894, s. 4 (17): "The expression party walls means (a) a wall forming part of a building, and being used, or constructed to be used, for separation of adjoining buildings belonging to different owners, or occupied or constructed or adapted to be occupied by different persons; (b) a wall forming part of a building and standing to a greater extent than the projection of the footings on one side on the grounds of different owners." The provisions of the French law are to be found in articles 653-664 of the Code Civil. See, too, Toullier, *Le Droit Civil Français*, liv. 2, ch. 3, art. 2, *Droits que donne la Mitoyenneté*; Demolombe, *Cours de Code Napoléon, Servitudes ou Services Fonciers, Des Murs Mitoyens et non Mitoyens*, liv. 12, tit. iv. ch. 8, § 1 *et seqq.*

user that constitute a party-wall are determined, the rights are fixed by the provisions of the Building Act.

Fry, J.'s,
judgment in
Knight v.
Pursell.

In this view, the following statement by Fry, J.,¹ is of importance:—"Acts of Parliament often take away some control of owners over their property for public purposes. Therefore I consider this wall to be a party wall, but only so far as it is used by the plaintiff on the one hand and the defendant on the other as a support for their buildings. The case of *Weston v. Arnold* shews that a wall may be a party-wall for some part of its height, and above that height may be the separate property of one of the adjoining owners. In the same way I hold this wall to be, laterally, a party-wall for such distance as it is used by both plaintiff and defendant for their buildings, and no further. The result is that, for the distance that the plaintiff's closets extend,² the wall is a party-wall, and, upon giving the proper notices under the Act, the defendant may deal with that part of the wall in accordance with the 88th section of the Act."³

Under the Metropolitan Building Act, 1855, the builder is not exonerated from liability for damage arising from his negligence or want of care and skill. Though he is acting under statutory provisions he is still liable for loss and damage occasioned to another by any falling short on his part of requisite care and skill.⁴

¹ *Knight v. Pursell*, 11 Ch. D. 412, at 415.

² L. R. 8 Ch. 1084.

³ The facts shewed that the plaintiff was the owner of a boundary wall built on his own land, against which he had built some closets, and the defendant, his adjoining neighbour, had recently built a substantial structure.

⁴ See a Canadian case, *Brooke v. M'Lean*, 5 Ont. Rep. 209. The law relating to party walls generally is treated in 3 Kent, Comm. (13th ed. 437), and in a note to *Bloch v. Isham*, 92 Am. Dec. 289-306, where the right of building upon and adding to party walls is discussed, as well as the ownership of such walls and the easements incident thereto. See also *Moloney v. Dixon*, 54 Am. R. 1. Perhaps the most exhaustive treatment of the subject from an English standpoint, and with reference to its practical as well as its legal bearings, is to be found in a paper on "Party and Party Fence Walls," by Mr. C. H. Bedell in the *Transactions of the Surveyors' Institution*, vol. xxiv. 65-96, and the comments on it in *Professional Notes*, vol. v. 222-249. See also a Canadian case, *Joyce v. Hart*, 1 Can. S. C. R. 321.

⁵ *White v. Peto*, 58 L. T. 710. A tenant in possession of part of a house is an adjoining owner under 18 & 19 Vict. c. 122, and must be served with notice, *Fillingham v. Wood* (1891), 1 Ch. 51.

CHAPTER V.

ANIMALS.

THE English law has so many points of contact with the civil law on this subject that it may be well shortly to summarize some of the leading positions of that law previously to entering on the detailed examination of what amount of liability is imputed by the law of England to those who have the custody of animals.¹

In Roman law *noxia* is the damage, arising *ex delicto* or *quasi* Roman law. *ex delicto*, of a slave, who is himself termed *noxæ* ;² though this term is sometimes used to designate the damage done by him.³ The *actio noxalis* is the remedy given by the law for this, and gives the master the option either of paying the amount of the injury or of surrendering the slave for satisfaction.⁴ The noxal action first appears in the Twelve Tables :⁵ *Si quadrupes pauperiem fecisse dicetur, actio lege duodecim tabularum descendit : quæ lex voluit aut dari (id) quod nocuit, id est, id animal quod noxiam commisit ; aut æstimationem noxiæ offerre.* This was extended by the *Lex Aquilia*. The distinction between the law of the Twelve Tables and the *Lex Aquilia* is thus explained : *Si servus sciente domino furtum fecit, vel aliam noxam commisit, servi nomine actio est noxalis ; nec dominus suo nomine tenetur. At in lege Aquilia (inquit) dominus suo nomine tenetur, non servi.*⁶

The effect of the provision of the law of the Twelve Tables on this point has been compared with the law of England,⁷ which, in the case of a beast straying and trespassing, permits the person Compared with English law permitting impounding of animal doing damage.

¹ In *Card v. Case*, 5 C. B. 622, there is a learned argument and some very learned notes, at 627, 628, on the ancient and foreign law on this subject.

² Inst. 4, 8, 1 ; Gaius, 4, 75 ; D. 9, 1, 1, § 1.

³ Colquhoun, Roman Civil Law, § 2195.

⁴ Gaius, 4, 75. *Erat enim iniquum nequitiam eorum ultra ipsorum corpora parentibus dominisque damnosam esse.*

⁵ D. 9, 1 pr. The fragment of the Twelfth Table says, *Si servus furtum faxit noxiamve nocuit.*

⁶ D. 9, 4, 2, § 1.

⁷ Y. B. 1 E. II. 18, pl. 2. Colquhoun, Roman Civil Law, *Actio Noxalis*, § 2196. The subject is also illustrated in that admirable book, Holmes, *The Common Law*. Lecture I., Early Forms of Liability.

on whose land it is found in certain circumstances to seize and impound it till the owner comes and redeems it by paying the damage and expenses of keep. In the event of the damage proving greater than the value of the beast, the owner was unlikely to do this. In that case the person damnified, not having at common law the right to sell, was practically without remedy, being unable to sue for the damage done by the animal, so long as he held the distress;¹ and being subject to the obligation of maintaining the beast, till 5 & 6 Will. IV. c. 59,² gave him the right to sell. Sir Patrick Colquhoun considers³ a similar difficulty to have been the origin of the chapter of the *Lex Aquilia*, which gave an action of malicious damage against the master, either on the hypothesis that he had refused the surrender of the *noxæ*, slave or beast, or that the *noxæ* in doing the damage acted under his direction.

Pauperies.

The name strictly given to the damage done by an irrational animal belonging to another was *Pauperies*; *quia quasi pauperiorem facit lædatum. Pauperies est damnum sine injuria facientis datum. Nec enim potest animal injuriam fecisse dici, quod sensu caret.*⁴ The term *pauperies* does not appear strictly to have been adhered to; for it occurs occasionally where the expressions *noxæ* or *noxia*, and the action descending from them, *actio noxalis*, would appear to have been applicable.⁵

By the Twelve Tables the animal must have been four-footed,⁶ though by construction the remedy was extended, *hæc actio utilis competit et si non quadrupes sed aliud animal pauperiem fecit*,⁷ and thus an action could be brought for damage done by bipeds.

If the animal was given up in the satisfaction of the wrong, then the defendant went free.⁸

¹ *Boden v. Roscoe* (1894), 1 Q. B. 608.

² 5 & 6 Will. IV. c. 59 s. 4, is repealed by 12 & 13 Vict. c. 92, which does not re-enact the power of sale.

³ Colquhoun, *Roman Civil Law*, § 2196.

⁴ D. 9, 1, 1, § 3. *Pauperies damnum est sine injuria facientis datum; ut cum animal quod sensu et ratione caret damnum intulerit. Pauperiem damnum definit esse quod quadrupes facit. Caper in libro de orthographia, paupertatem a pauperie ita separat ut paupertas ipsa conditio sit pauperies damnum. Lexicon Juridicum, sub nom.*

⁵ Colquhoun, *Roman Civil Law*, § 2199.

⁶ D. 9, 1, 1, § 2. *Quæ actio ad omnes quadrupedes pertinet.*

⁷ D. 9, 1, 4. Colquhoun, *Roman Civil Law*, § 2201, has the following note:—"There is a sufficiently absurd note in Höpfner's Commentary, § 1170, note 5, as follows: Boileau was so severely wounded by a turkey-cock in the private parts when a child as to feel the effects of it all his life. Hence Helvetius says his dislike to women, *son épître sur l'amour de Dieu*, and his hatred to the Jesuits arose from their having introduced bubbly-jocks into France."

⁸ Inst. 4, 9. The law of England anciently seems to have been similar. In Fitzherbert, *De Natura Brevium* (Hale's ed.), 89, L. note (b), it is said: "If my dog kills your sheep and I freshly after the fact tender you the dog, you are without remedy: 7 Edw. III., Barr. 290." The reference is to Fitzherbert's Abridgement.

The action generally applied to those animals only *quæ contra naturam moventur*.—*Ceterum si genitalis sit feritas, cessat actio*.

The law of the Twelve Tables and the *Lex Pesulania de cane* Provisions of the Roman law. forbade any one to keep a savage beast (and it is noteworthy that a dog is here mentioned with a boar, a bear, and a lion) near to a public road *qua vulgo iter fit*; and if a beast so kept did damage to a passer-by, it was forfeited by way of indemnity, if even the most remote blame could be laid to the owner's charge; while the later *Ædilitian edict* ran: *Quà vulgò iter fiet, ita habuisse velit, ut cuicumque nocere, damnumve dare possit. Si adversus ea factum erit, et homo liber ex ea re perierit, solidi ducenti¹ præstabuntur; si nocitum homini libero esse dicetur, quanti bonum et æquum judici videbitur, condemnnetur; cæterarum rerum, quanti damnum datum factumve sit, dupli.²* No action lay if an animal were irritated or roused by another. Thus, when a horse was spurred, and reared and kicked any one, it did not commit *pauperies*.³ In this case the person that irritated the horse was liable, and not the owner. So when a dog was chained in a house, and some one stumbled on it accidentally and was bitten, the owner was not liable.⁴ If the owner took it where he ought not, and allowed it to slip, he was liable for all the damage, from which the surrender of the dog would not excuse him.⁵

We have seen that a dog was associated with a boar, a bear, and a lion; it is therefore not unfair to assume that a similar liability would arise in those cases where there was negligence. The responsibility for the animal follows its ownership (*noxa caput sequitur*⁶). If the animal died naturally or by accident, the owner's liability was extinguished.⁷ Where a domestic beast did damage, even *secundum naturam suam*, by straying and grazing on another's land, an action lay under the Twelve Tables.⁸

¹ About £120; a *solidus* ranged in value from 11s. 4d. to 11s. 8d.

² D. 21, 1, 42.

³ Paul, Sent. 1, 15, 3. *Ei, qui irritatu suo feram bestiam vel quamcunque aliam quadrupedem in se proritaverit, eaque damnum dederit, neque in ejus dominum neque in custodem actio datur*, printed in Meerman, *Thesaurus Juris Civilis*, vol. vii. 694.

⁴ D. 9, 1, 2, 1. *Si quis aliquem evitans, magistratum forte, in taberna proxima se immisisset, ibique à cane feroce læsus esset, non posse agi canis nomine, quidam putant; at, si solutus fuisset, contra.* The following passage will shew that the legal obligation to have dogs under control is no new one:—*Si quisquam canem habens in plateis, aut in viis publicis, cum diurnis horis in ligamina non redegerit, quidquid damni fecerit, id a domino dissolvatur*: Paul. Sent. 1, 15, 1.

⁵ D. 9, 1, 1, § 5.

⁶ D. 9, 1, 1, 12.

⁷ D. 9, 1, 1, § 13, 16. In the middle ages animals were judicially tried for offences. There is a very curious article on this superstition, entitled *Prosecutions against Animals*, in *Am. Jur.* vol. i. 223, being a translation of two articles from the *Paris Themis*, vol. I. 194; vol. viii. 45.

⁸ D. 19, 5, 14, § 3. The text is: *Si glans ex arbore tua in meum fundum cadat, eamque ego immisso pecore depascam. Aristo scribit, non sibi occurrere legitimam actionem, qua experiri possim; nam neque ex lege duodecim tabularum de pastu pecoris,*

Lord Esher, M.R.'s, division of animals as regarded by the law of England.

Lord Esher, M.R., in *Filburn v. People's Palace and Aquarium Company*,¹ lays down that "the law of England recognises two distinct classes of animals; and as to one of these classes it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous or not. As to another class the law assumes that animals belonging to it are not of a dangerous nature, and any one who keeps an animal of this kind is not liable for the damage it may do, unless he knew that it was dangerous."

Those not of a dangerous nature he further subdivides into a class "harmless by its very nature" and a class "that has become so by what may be called cultivation." All that are not within these two classes fall "within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself." The test determining to which class any particular animal may belong, is, says Bowen, L.J., "the experience of mankind."²

There is, however, high authority³ for distinguishing the legal liabilities affecting those animals, in which by law there is at least a qualified property, from those of a savage and irreclaimable character, both of which are descriptions included in Lord Esher, M.R.'s class of dangerous animals. While as to the other class of "not dangerous" animals, a dog and an ox would appear to be included under the same subdivision; yet the legal position of their owners, for instance, as regards their trespasses, is not at all identical. Therefore, for the purpose of discussing the legal relations that arise, it seems more convenient to examine the subject under four classes.

Animals, then, may be considered as :

Four classes.

I. Those of a savage and irreclaimable character, as lions, tigers, bears, &c.

II. Those that have been thoroughly tamed, and are used for burden or husbandry or for food, such as horses, cattle, and sheep, and which are as truly property of intrinsic value and entitled to the same protection as any other kind of goods.

III. Those that in their state of domestication never wholly

quia non in tuo pascitur; neque de pauperie, neque damni injuria agi posse. In factum itaque erit agendum. To which there is a gloss of Accursius: *Sed quid si mea pecora in tuo glandes tuas pasta fuerunt sine mea immissione? Respondit habet locum forte de pauperie Accursius.*

¹ 25 Q. B. Div. 258.

² *L.c.* at 261.

³ See per Bramwell, B., *Nichols v. Marsland*, L. R. 10 Ex. 255, at 260; also per Maule, J., *Morgan v. Earl of Abergavenny*, 8 C. B. 768.

lose their wild natures and destructive tendencies, and are kept either for uses which depend on retaining those native instincts or else for the whim and gratification of the owner.

IV. Those *feræ naturæ* and unreclaimed, yet not of a savage and irreclaimable character.

I. In regard to savage and ferocious animals the duty of any one professing to keep them is absolute and independent of negligence. The propensity of such animals to dangerous mischief is well known. The duty with regard to them corresponds with that respecting other dangerous agencies as laid down in *Rylands v. Fletcher*; ¹ and is to exercise such a degree of care as will absolutely prevent the occurrence of an injury to others through such vicious acts of the animal as he is naturally inclined to commit, in any way whatever. To such an extent is this carried that *Bramwell, B.*, in *Nichols v. Marsland*, is reported: "I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable."²

Lord Raymond, C.J., in the celebrated case of *Rex v. Huggins*,³ very clearly lays down the law: "There are, indeed, cases of murder where no act was done by the persons guilty, as the letting loose a wild beast, which the party knows to be mischievous, and he kills a man (3 Edw. III. corone 311; ⁴ Staunf. 17; ⁵ Crompt. 24 b⁶), the owner of the beast is guilty of murder. In answer to those cases, there is a difference between beasts that are *feræ natura*, as lions and tigers, which a man must always keep up at his peril, and beasts that are *mansuetæ natura*, and break through the tameness of their nature, such as oxen and horses.⁷ In the latter case an action lies if the owner has had notice of the quality of the beast; in the former case an action

¹ L. R. 3 H. L. 330, in Ex. Ch. L. R. 1 Ex. 265.

² L. R. 10 Ex. 255, at 260.

³ 2 Ld. Raym. 1574, at 1583.

⁴ The reference is to Fitzherbert, Abr. Corone 311.

⁵ Where it is said *qui si home ad un jument que est accustome amale faire, et le owner ceo bien sachant, ne liga luy suffra daller alarge, et puis le jument tua un home; que ceo est felony in le owner, eo que per tiel sufferance, le owner semble daver volunte a tuer.* The date of this is 1583.

⁶ "L'office et auctorite de Justices de Peace, in part collect per Sir Anthonie Fitzherbert." "Inlarge per Richard Crompton," 1606.

⁷ Besides the distinction between animals *feræ naturæ* and *mansuetæ naturæ*, there is a further distinction between animals *mansuetæ naturæ* and *mansuefactæ naturæ*—that is, where an animal having been caught and shut up, has changed its wild nature, and no longer tries to escape, *si ex consuetudine abire et redire solet*, it is called *mansuefactæ naturæ*; where its nature is tame, it is called *mansuetæ*. *Scientia* was an element also in liability under the Mosaic law. If an ox gored a man or a woman that they die, then the ox shall be surely stoned, and his flesh shall not be eaten, but the owner of the ox shall be quit. But if the ox were wont to push with his horn in time past, and it hath been testified to his owner and he hath not kept him in, but that he hath killed a man or a woman, the ox shall be stoned, and his owner also shall be put to death: Exod. xxi. 28, 29. See Hale, History of the Pleas of the Crown (Dogherty's ed.), vol. i. 430.

I. Savage and
ferocious
animals.

Rex v.
Huggins :
law stated by
Holt, C.J.

lies without such notice. As to the point of felony, if the owner have notice of the mischievous quality of the ox, &c., and he uses all proper diligence to keep him up, and he happens to break loose and kills a man, it would be very hard to make the owner guilty of felony. But if through negligence the beast goes abroad after warning or notice of his condition, it is the opinion of Hale that it is manslaughter in the owner. And if he did purposely let him loose and wander abroad with a design to do mischief—nay, though it were but with a design to frighten people and make sport—and he kills a man, it is murder in the owner.”

Rule laid down by Lord Denman, C.J., in *May v. Burdett*.

The rule is also stated by Lord Denman, C.J., in the leading case of *May v. Burdett*,¹ “that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure *at his peril*, and that, if it does mischief, negligence is presumed without express averment.” The first impression from these words would probably be that some proof of knowledge must be given; that this is not so appears from Crowder, J.’s, charge to the jury in the subsequent case of *Besozzi v. Harris*:² “The statement” “that the defendant knew the bear to be of a fierce nature must be taken to be proved, as every one must know that such animals as lions and bears are of a savage nature. For though such nature may sleep for a time, this case shews that it may wake up at any time. A person who keeps such an animal is bound so to keep it that it shall do no damage. If it be insufficiently kept, or so kept that a person passing is not sufficiently protected, the owner is liable.”

An elephant comes under the same rule;³ since “it cannot be doubted that elephants as a class have not been reduced to a state of subjection; they still remain wild and untamed, though individuals are brought to a degree of tameness which amounts to domestication. A person, therefore, who keeps an elephant does so at his own risk, and an action can be maintained for any injury done by it, although the owner had no knowledge of its mischievous propensities.”⁴

Suggested distinction between animals indigenous and imported.

By the Roman law, as we have already seen, if a wild animal escaped, without negligence, the temporary owner of it would not be liable to make it good: *Si genitilis sit feritas [actio]*

¹ 9 Q. B. 101.

² 1 F. & F. 92, at 93. A very similar case is *Wyatt v. Rosherville Gardens Company*, 2 Times L. R. 282; which was followed in *Shaw v. M’Creary*, 19 Ont. R. 39.

³ *Filburn v. People’s Palace and Aquarium Company*, 25 Q. B. Div. 258, at 261.

⁴ See *Harper v. Marcks* (1894), 2 Q. B. 319, per Wright, J., at 323. So too the Roman law: *Item feræ bestiæ nec mancipi sunt velut ursi, leones, item ea animalia quæ fere bestiarum numero sunt, veluti elefantes et cameli; et ideo ad rem non pertinet quod hæc animalia collo dorsove domari solent*: Gaius 2, § 16.

cessat.¹ By English law a distinction must be taken between animals indigenous and animals imported. If a man brings a bear on his land (since bears are not now native animals) he must keep "it safe" at all hazards; but if he brings a fox, and it escapes, the liability of the sometime owner terminates with the escape, of course excluding negligence.²

The language of Bowen, L.J., in *Filburn v. People's Palace and Aquarium Company*,³ would include liability for an escaped tame fox as well as for an escaped tame bear. He says: "If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do." But the point before the Lord Justice was merely as to the mischief done while it was the property of the person sued (for which undoubtedly the owner would be liable), and the Lord Justice was considering the matter as an instance of the "broad principle" laid down in *Fletcher v. Rylands*. In some instances this would undoubtedly include the fox, *e.g.*, if the fox were kept in a town where otherwise it would not have found its way. Still, there seems a clear distinction, where a tame fox kept in a fox hunting district escapes and resumes its natural habits, from the case of a bear, or wolf, or lion which has been imported, escaping and doing mischief. The difficulty may admit of being solved by the consideration of "ownership." The property in the fox, when he escaped, would cease to exist. It does not necessarily follow that it would in the case of the other animals, though the assumption that it would has been frequently made; it is not by any means manifest that their escape is correlative with a resumption of their natural state.⁴

Dictum of
Bowen, L.J.,
in *Filburn v.*
People's
Palace and
Aquarium
Company.

In *Gundry v. Feltham*⁵ it was held that a man may hunt a

Hunting.
Gundry v.
Feltham.

¹ Inst. 4, 9. The distinction is taken between inborn fierceness (*genitalis feritas*) and a confirmed vicious habit (*calcitrosus, petere solitus*).

² Com. Dig. Action on the Case for Negligence (A 5). See *ante*, 610.

³ 25 Q. B. Div. 258, at 261.

⁴ This is not so by the Roman law. There "*naturalem autem libertatem recipere videtur cum aut oculos nostros evaserit, aut, licet in conspectu sit nostro, difficilis tamen ejus rei persecutio sit*": Gaius 2, § 67. But this is not said with reference to imported animals.

⁵ 1 T. R. 334; *Nicholas v. Badger*, 3 T. R. 259, n.; *Gedge v. Minne*, 2 Bulstr. 60. In this case *Dodderidge, J.*, having observed, "It is not lawful by the common law for any one to hunt for pleasure or for profit, but otherwise, where it is for the good of the commonwealth," subsequently in the case, *Croke J.*, "agreed the difference before taken by *Dodderidge*, and demanded whether it was lawful for any one to come into another's orchard for to kill a bullfinch there, being a hurtful bird for picking the blossoms off from the trees; and this may be alleged to be for the public good, but yet this is not lawful for one so to do; and the Court in this case did agree that upon a pursuit he might well follow and kill, but not otherwise without the assent of the owner of the ground, and that the case of 12 H. VIII. ought to be intended to be in the case of a pursuit." The case, Y.B. 12 H. VIII. 9, pl. 2, is referred to and explained by Lord Ellenborough in *Earl of Essex v. Capel*. The passage is set out in the text. In Scotland the same distinction has been established between hunting foxes for the purpose of sport and the pursuit of those animals by farmers for the protection of their flocks. Farmers may enter

Earl of Essex
v. Capel.

fox into the ground of another, and not be liable for trespass on the ground that a man might justify entering into the land of another to kill a fox, gray, or an otter, because they are beasts injurious to the commonwealth.¹ In the *Earl of Essex v. Capel*: Lord Ellenborough, speaking of fox-hunting, was of a different opinion: "These pleasures are to be taken only when there is the consent of those who are likely to be injured by them, but they must be necessarily subservient to the consent of others. There may be such a public nuisance by a noxious animal as may justify the running him to his earth, but then you cannot justify the digging for him afterwards, that has been ascertained and settled to be law; but even if an animal may be pursued with dogs, it does not follow that fifty or sixty people have, therefore, a right to follow the dogs and trespass on other people's lands. I cannot see what it is that is contended for by the defendant. The only case which will at all bear him out is that of *Feltham v. Gundry*. If it be necessary, I should be glad that that case should be fully considered. I have looked into the case in the Year-book 12 Henry VIII. 9, pl. 2. That seems to be nothing more than the case of a person who had chased a stag from the forest into his own land, where he killed it, and on an action of trespass being brought against the forester who came and took the stag, he justified that he had made fresh suit after the stag, and it was held that he might state that he was justified, and the plaintiff took nothing by his writ. This is the case upon which that of *Feltham v. Gundry* is built, but it is founded only on an *obiter dictum* of Justice Brooke, and it does not appear to me to be much relied on; but even in that case it is emphatically said by the judge that a man may not hunt for his pleasure or his profit, but only for the good of the common weal, and to destroy such noxious animals as are injurious to the common weal. Therefore, according to this case, the good of the public must be the governing motive." In the subsequent case of *Hume v.*

Hume v.
Oldacre.

enclosures in pursuit, *Colquhoun v. Buchanan*, Morison (Dict. of Decisions), 4997. Mr. Steel, Attorney-General to the Commonwealth, in his argument on the trial of the Duke of Hamilton, said: "If one pass over another's land without his consent, to fetch a falcon or the like, he may be punished as a trespasser; but not so, if to hunt or kill a fox or an otter, because these are creatures *contra bonum publicum*." 4 How. St. Tr. 1171.

¹ Cp. speech of Oliver St. John on the trial of the Earl of Strafford, 3 How. St. Tr., at 1509: "It is true we give law to hares and deers, because they be beasts of chase. It was never accounted either cruelty or foul play to knock foxes and wolves on the head as they can be found, because these be beasts of prey." In *Mitten v. Faudrye*, Poph. 161, it is said a man may hunt and pursue a fox into any man's land, "because a fox is a noisome creature to the commonwealth." Vin. Abr. Hunting; Com. Dig. Chase (H), Hunting, or Hawking in a forest.

² Hertford Assizes, 1809, Chitty, Game Laws, 32, note (f), which book may be referred to on the whole of this subject. See, too, Campbell, Lives of the Chief Justices, vol. iii. 164.

Oldacre,¹ before Lord Ellenborough, damages were allowed to be recovered against a huntsman, not only for the mischief done by the defendant himself, but also for that done by the concourse of people who accompanied him.

The distinction taken by Lord Ellenborough between entering another's land in pursuit of a noxious animal for the sole purpose of killing and doing so for purposes of sport was adopted in *Paul v. Summerhayes*,² where the true view was expressed to be—that a person has no right, in the pursuit of the fox as a sport, to come upon the land of another against his will. The ruling of Lord Tenterden, C.J., in *Baker v. Berkeley*,³ goes even further. There the Lord Chief Justice lays down that “if a gentleman sends out his hounds and his servants, and invites other gentlemen to hunt with him, although he does not himself go on the lands of another, but those other gentlemen do, he is answerable for the trespass that they may commit in so doing, unless he distinctly desires them not to go on those lands.” This case is obviously misreported. No man is liable for the independent tort of another; and the ownership of a pack of hounds is not penalized by a liability for the trespasses of the owner's guests. The case is very different if a necessary or probable consequence of hunting a country is to ride over lands the occupier of which objects to such a licence being taken. There is, then, a duty on the owner of hounds to warn his guests against interference with the rights of property of another. No such duty arises unless antecedently a trespass seems necessary or probable. For example, a guest separated from the hunt, which he rejoins by a short cut over lands out of the direct course, would not affect his host by his independent act. The proposition should be limited to those acts done by guests as a portion of the hunting party.

Lord Tenterden, C.J.'s ruling in *Baker v. Berkeley*.

No such duty arises.

II. Animals that have been thoroughly tamed and are used for burden or husbandry, or for food.

II. Animals that have been thoroughly tamed.

These are the subjects of larceny at common law. Of this class are ducks, hens, geese, turkeys, peacocks; all which, with their eggs and young, are alike protected by law.⁴

A man is answerable not only for his own trespass, but for those of his cattle also; since if by his negligent keeping they stray upon the land of another, and tread down the herbage and spoil the corn or trees, the owner must answer in damages; and

¹ 1 Stark (N. P.) 351. There is a curious discussion of the question whether it is lawful for a bishop to hunt in 2 How. St. Tr. 1165-1181, in the Proceedings against Abp. Abbot for homicide through the glancing of an arrow as he was shooting at a deer.

² 4 Q. B. D. 9.

³ 3 C. & P. 32.

⁴ 1 Hale Hist. P. C. 511; Hawk. P. C. bk. i. c. 33, § 43.

the law gives the party injured a double remedy, either by permitting him to distrain the cattle thus damage feasant, or else by leaving him to his action.¹

Mason v.
Keeling.

This appears from what Holt, C.J., is reported to have said in *Mason v. Keeling*:² "The difference is between things in which the party has a valuable property, for he shall answer for all damage done by them; but of things in which he has no valuable property, if they are such as are naturally mischievous in their kind, he shall answer for hurt done by them without any notice; but if they are of a tame nature, there must be notice of the ill quality, and the law takes notice that a dog is not of a fierce nature, but rather the contrary." "If any beast in which I have a valuable property do damage in another's soil in treading his grass, trespass will lie for it; but if my dog go into another man's soil no action will lie." Holt, C.J., draws the distinction between animals in which there is a "valuable property"—that is, which are the subject of larceny at common law—and those in which there is not. This latter class he divides into those which are "naturally mischievous in their kind" and those which are of a tame nature. The former we have already considered; the latter we shall consider presently.

Holt, C.J.'s,
division:
(i.) Animals in
which there is
a valuable
property;
(ii.) Animals
in which there
is not.

(i.) Animals
in which
there is a
valuable
property.

With regard to those that are a "valuable property" at common law, the owner is to "answer all damage done by them"—*e.g.*, by straying and trampling down grass or corn. For though the owner of an animal, such as a cow, which he allows to roam about is responsible for damage caused by its trespassing, yet animals not of mischievous nature, he is entitled to suppose, will not injure any one until he has actual knowledge to bring him to a contrary opinion.³ That is, whether animals are "valuable property" at common law, or merely "of tame nature," without being "valuable property," the same rule applies that the owner must have notice of any peculiar savageness of disposition—which is not the property of the class as reclaimed, but the specialty of any individual member of it—before any liability can attach from it; for their trespasses he is in any event liable.

(ii.) Animals
in which there
is not a
valuable
property.

The law on this point was settled in three cases, *May v. Burdett*

¹ 3 Bl. Comm. 211.

² 12 Mod. 332, 1 Ld. Raym. 606.

³ Per Blackburn, J., *Smith v. Cook*, 1 Q. B. D. 79. In *Sanders v. Teape*, 51 L. T. 263, defendant's dog jumped over a low wall on the other side of which plaintiff was working digging. The dog fell on him and injured him. Plaintiff was held not entitled to recover, since the dog's act was mere frolic, and there could be no recovery without evidence of a mischievous disposition. Where, however, *coupled* greyhounds rushed against plaintiff and injured him on the highway he was held entitled to recover without proof of the *scienter*: *Jones v. Owen*, 24 L. T. (N. S.) 587.

in the Queen's Bench,¹ Jackson *v.* Smithson in the Exchequer,² and Card *v.* Case in the Common Pleas;³ and was most clearly expressed and explained by the Lord Chancellor⁴ in Fleeming *v.* Orr:⁵ "The reason why by the English law it is necessary to allege and prove the *scientia* is that in the case of an animal *Scientia, mansuetæ naturæ* the presumption is that no harm will arise from leaving it at large. Starting from that presumption, it follows that there cannot be blame or negligence in the owner merely from his allowing liberty to an animal which has not by nature the propensity to cause mischief. Blame can only attach to the owner when, after having ascertained that the animal has propensities not generally belonging to his race, he omits to take proper precautions to protect the public against the ill consequences of those anomalous habits, and therefore, according to the English law, it is necessary to aver and prove this knowledge on the part of the owner. But, after all, the *culpa* or negligence of the owner is the foundation on which the right of action against him rests, though the knowledge of the owner is the medium, and the only medium, through which we in England arrive at the conclusion that he has been guilty of neglect—and in that sense it is said that the *scientia* is the gist of the action." Blackburn, J.'s, comment⁶ is: "I suppose that this law was suited to the convenience of earlier times, when cattle were left to wander about on open commons, and it was thought that the mere fact that bulls sometimes toss people was not by itself enough to make their owners liable for their acts."

A word may here be said with regard to the position of deer *Deer.* in this connection. As to them there seems some uncertainty; they do not readily fit into Lord Esher's classification in Filburn *v.* People's Palace and Aquarium Company,⁷ since they cannot be called dangerous animals. Neither can they without several limitations be strictly referred to either of his sub-classes of non-dangerous animals—those harmless by their very nature—or those that have become so by cultivation.

¹ 9 Q. B. 101.

² 15 M. & W. 563.

³ 5 C. B. 622. See Hogan *v.* Sharpe, 7 C. & P. 755.

⁴ Lord Cranworth.

⁵ 2 Macq. (H. L. Sc.) 14, at 23. By the French Code neither knowledge in the owner of the mischievous qualities of the animal, nor even the existence of these qualities, is regarded: Code Civil, art. 1385.

⁶ Smith *v.* Cook, 1 Q. B. D. 79, at 82. The *scientia* was required to be proved in an action against a man whose dog bit the plaintiff's sheep so far back as Y.B. 28 H. VI. 7, pl. 7, according to Reeves, Hist. of Eng. Law (2nd. ed.), vol. iii. 391. See as to *Scientia*, Bac. Abr. Trespass (I.) 696.

⁷ 25 Q. B. Div. 258. As to the property in deer, see Y.B. 18 E. IV. 14 pl. 12; Reeves, Hist. of Eng. Law (2nd. ed.), vol. iii. 370; *Re Longpoint Company v. Anderson*, 19 Ont. R. 487; Bac. Abr. Trespass (I.) 696.

Willes, C.J.'s,
Classification.

Willes, C.J., delivering the judgment of the Common Pleas in *Davies v. Powell*,¹ adopted a different principle from Lord Esher, M.R.'s. "When," he says, "it was holden that deer were not distrainable, it was because they were kept principally for pleasure and not profit, and were not sold and turned into money as they are now. But now they are become as much a sort of husbandry as horses, cows, sheep, or any other cattle." This was said in considering whether deer might be distrained for rent; and the distinction drawn between pleasure and profit was between beasts of venery and those kept either for actual money-making or for ornament. The question whether deer are tame or wild animals came again before the Court of Common Pleas in *Morgan v. Earl of Abergavenny*,² where the issue was whether deer in a park went to the executor or to the heir. After a most elaborate argument, Maule, J., delivered the considered judgment of the Court, in the course of which he said: "It is truly stated that ornament and profit are the sole objects for which deer are now ordinarily kept, whether in ancient legal parks or in modern enclosures so called; the instances being very rare in which deer in such places are kept and used for sport; indeed their whole management differing very little, if at all, from that of sheep or of any other animals kept for profit." Subsequently, Wood, V.C., on a similar question arising in *Ford v. Tynte*³ said: "On the authority of *Morgan v. The Earl of Abergavenny*, I must hold, that these deer are tame and no longer part of the inheritance."

Maule, J.,
delivers the
judgment of
the Common
Pleas in
Morgan v.
Earl of
Abergavenny.

Conclusion.

Since then it is obvious that deer cannot universally be affirmed, either to be tame or not tame, the question must be decided, in each particular case, previously to determining whether the owner is liable for injuries done by them, and must be a question of fact left to the jury. If, then, the jury find that any particular deer are "of tame nature" or "of valuable property,"⁴ and the cases last cited seem to point out indicia to which their attention should be directed, the owner would not be responsible for injury done by one to any person, unless he were shown to have knowledge of its vicious disposition. If the jury find that any particular deer are not of "tame nature" or "valuable property," then the owner would be liable for injury done by them without notice of a vicious disposition.

This seems to be the effect on this point of Maule, J.'s

¹ Willes, (C. P.) 46, at 51; see also at 48. The note of the case is "Deer in an enclosed ground may be distrained for rent."

² 8 C. B. 768, at 798. The argument in this case should be referred to for the authorities.

³ 2 J. & H. 150, at 154.

⁴ "Valuable property" in the sense here applicable would seem to be determined by the answer to the inquiry, are they kept for food?

judgment in *Morgan v. Abergavenny*.¹ It is also consistent with the United States case of *Spring Company v. Edgar*,² where the respondent in error sued for injuries inflicted on her by a male deer in the appellants' park. The declaration alleged that the appellants "knew the deer to be dangerous," and this allegation was taken to be established. Thus, whether the deer in the park were wild or tame, the appellants were fixed with liability. The question then suggests itself, what is the position of visitors in a park frequented by deer—for example, in Greenwich Park? Assuming the deer are tame, liability would, it is manifest, only arise from a knowledge of a vicious disposition in any particular animal which subsequently does mischief. If the deer are to be regarded as not tame, and are known not to be tame, visitors to the park are probably in the position of mere licensees, who go there subject to the presence of the deer; unless perchance they have a right to use the park, and the deer are placed there as an addition to the attractions of the scenery, when there would seem to be an undertaking on the part of those introducing them that they will do no injury if not interfered with. There is the further consideration, applicable to all the cases put, that if any danger more than ordinary is likely to arise, as in the rutting season,³ warning must be given of it. Deer in a deer forest would affect their owner with no liability whatever, neither while they remain nor if they stray, since they are indigenous.⁴

Evidence of knowledge must obviously vary in different circumstances; and, as the keeping of animals is lawful, knowledge of a mischievous propensity is not conclusive without negligence, though it is a very strong indication of negligence.⁵

In *Beck v. Dyson*,⁶ Lord Ellenborough held that it was not sufficient to show that a dog is of a fierce and savage disposition and usually tied up, and that the defendant promised to compensate the plaintiff after the latter had been bitten by the dog. In

¹ 8 C. B. 768, at 798.

² 99 U. S. (9 Otto) 645.

³ See *Spring Company v. Edgar*, 99 U. S. (9 Otto) 645. The Roman law says: *Cervos quoque ita quidam mansuetos habent, ut in silvas ire et redire soleant, quorum et ipsorum feram esse naturam nemo negat.* Inst. 2, 1, 15. That, however, was with regard to the ownership of them. As to Hunting and Deer-stealing, Com. Dig. Justices of Peace (B. 47).

⁴ *Ante*, 610.

⁵ As to this, see per Bramwell, B., *Cooke v. Waring*, 2 H. & C. 332, at 338.

⁶ 4 Camp. 198. As this case is inconsistent with the law as subsequently settled, it may be well to quote the remark of the Lord Chancellor (Cranworth), in the House of Lords, in *Williams v. Bayley*, L. R. 1 H. L. 200, at 213, where, speaking of Campbell's Reports, he says: "On all occasions I have found, on looking at the reports by the late Lord Campbell of Lord Ellenborough's decisions, that they really do, in the fewest possible words, lay down the law very often more distinctly and more accurately than it is to be found in many lengthened reports; and what is so laid down has been subsequently recognized as giving a true view of the law as applied to the facts of the case."

Jones v.
Perry.

Judge v.
Cox.

Thomas v.
Morgan.

Worth v.
Gilling.

Hudson v.
Roberts.

Jones v. Perry¹ Lord Kenyon laid great stress on the circumstance that the defendant had had his dog tied up, and said that it showed a knowledge that the animal was fierce and unruly, and not safe to be let go abroad. Abbott, J., also, in Judge v. Cox,² left it to the jury to say whether, from a caution not to go near a dog, they would infer knowledge of its disposition. Parke, B., in Thomas v. Morgan,³ held that an offer of compromise was so far an admission of liability that it ought to have been left to the jury, but "it ought to have been submitted to them with a strong observation in favour of the defendant. Lord Ellenborough thought it entitled to so little weight, that he refused to leave it to a jury. But though we think, strictly speaking, it is a fact to go to the jury, yet it ought to have little or no weight at all with them, for the offer may have been made from motives of charity without any admission of liability at all." In Worth v. Gilling⁴ knowledge of an animal's ferocity was considered sufficient to fix the owner with liability for subsequent injury, so that actual previous damage had been done by it need not be shown. The question there agitated was whether knowledge of actual harm done was not requisite to raise a right of action in contradistinction to knowledge of a disposition to do harm, not whether knowledge without negligence was enough.

The decision accords with the judgment of the Exchequer in Hudson v. Roberts,⁵ where the inquiry was as to what facts inferred knowledge. The injury arose from driving a bull through a street, where the plaintiff lawfully was. Plaintiff was wearing a red handkerchief, which irritated the animal, that ran at him and did him considerable injury. The defendant was proved to have said after the accident that the red handkerchief was the cause of it, for he knew that *the* bull would run at anything red. Another witness gave evidence that on a different occasion the defendant said that he knew that *a* bull would run at anything red. The Court thought "that either expression was some evidence to go to the jury that the defendant knew that this animal was a dangerous one, and the first expression no doubt afforded

¹ 2 Esp. (N.P.) 482.

² 1 Stark. (N.P.) 285.

³ (1835) 2 Cr. M. & R. 496, at 502, 4 Dowl. Prac. Cas. 223, 5 Tyr. 1085.

⁴ (1866) L. R. 2 C. P. 1.

⁵ 6 Ex. 697. In the American case of Earhart v. Youngblood, 27 Pa. St. 331, where a bull had an antipathy to gray horses, Lowrie, J., said, at 332: "The rule is very plain and very just that the owner of an animal known to be vicious must take sufficient precautions that it shall do no injury to the *public*; and it must be so confined that *strangers* may pursue their own objects with security from it. The public are entitled to act upon the presumption that all dangerous animals are properly confined, and are therefore exonerated from any special caution against them except when without right they go upon their owners' land, and within the place where they may be lawfully kept: 1 Esp. 203; 5 C. & P. 489; 3 Id. 138."

distinct evidence that he knew that such was the character of this animal."

Where there is actual negligence, though no knowledge of vicious disposition, it seems that an action lies, otherwise, the owner of an animal would be in a better position than other people. The point does not appear to be decided; Maule, J., in *Card v. Case*,¹ alludes to it: "It may be, that the allegation of negligence, coupled with the consequent damage to the plaintiff, would shew a cause of action." The difficulty is rather in finding a case where negligence can be shewn apart from *scientia* productive of injury with regard to which *scientia* has usually to be proved. In all other classes of actions there can be no doubt that negligence alone is actionable; e.g., a man would undoubtedly be liable for throwing his dead dog into the highway, whereby the plaintiff's gig was overturned and the plaintiff injured, nor is he the less liable for chaining his living dog so that a similar accident happens. If, then, his negligence is the occasion of his dog biting, there seems no reason why he should go free. The law, as Lord Cranworth says, proceeds through knowledge to negligence.²

Where there is absence of knowledge of vicious disposition, but actual negligence, an action lies. Maule, J., in *Card v. Case*.

We have seen that the owner is liable for the trespasses of his animals where they are "valuable property." If they are trespassing and do injury "not in accordance with the ordinary instinct of the animals," the owner is not liable for the injury, apart from the trespass (though he may be for the trespass), unless he knows of the particular vice which caused the injury.

Trespass *contra naturam suam*.

This rule in both its aspects is shewn respectively by *Cox v. Burbidge*³ and an American case, *Dickson v. M'Coy*.⁴ In the former a horse grazing on a newly made road lashed out and severely injured a young child playing in the road. In the

Cox v. Burbidge.

¹ 5 C. B. 622, at 634.

² As to the word *scienter*, North, C.J., says it "implies no more than having notice, and in those actions" (i.e., where proof of *scientia* is necessary) "he" (the defendant) "must inform himself at his peril, and may, if he doubts, avoid danger by putting away those things which give offence," *Barnardiston v. Soame*, 6 How. St. Tr. 1063, at 1114. In *Parsons v. King*, 8 Times L. R. 114, a dog bit the same man twice within half an hour. Held impossible to say there was no evidence of *scientia*.

³ 13 C. B. N. S. 430. Cp. *Marsland v. Murray*, 148 Mass. 91, 12 Am. St. R. 520. See *Jackson v. Smithson*, 15 M. & W. 563—the case of a ram.

⁴ 39 N. Y. 400. Evidence of fractious and vicious conduct of a horse twenty months after an accident was admitted in *Kennon v. Gilmer*, 131 U. S. (24 Davis) 22, as tending to prove a vicious disposition at the time of the accident. "The habit of an animal is in its nature a continuous fact, to be shewn by proof of successive acts of a similar kind," per Bigelow, C.J., *Todd v. Inhabitants of Rowley*, 90 Mass. 51, at 58. In *Worms-dorf v. Detroit City Railroad Company*, 13 Am. St. R. 453, plaintiff was permitted to show the general reputation of a horse among the drivers and employes of its owners, as being an unsafe and untrustworthy horse to drive in a tram-car in order to affect the owners with notice of its qualities. "In case a dog bites pigs, which almost all dogs will do, a *scienter* is necessary," per Holt, C.J., *Mason v. Keeling*, 12 Mod. 332, at 335, referring to *Boulton v. Banks*, 3 Cro. (Car.) 254.

Dickson v.
M'Coy.

absence of any evidence that the horse was vicious, the plaintiff was held disentitled to recover; though it was intimated¹ that "no doubt, if the horse was trespassing there, the owner of the highway might have an action against the owner of the horse. So, possibly, the owner of the horse might be liable to an indictment for obstructing the highway, or to a fine." In the American case the owner was affected with notice of a habit of his horse to kick on the sidewalks, and was therefore held liable.² The effect of the cases is that there is no presumption made of vicious inclinations in animals whose natural tendency is not to do mischief. If animals of this sort do unexpected mischief, the owners are not liable. They become liable so soon as they have reason to suspect the occurrence of any particular injury.

Smith v.
Cook.

The decision in *Smith v. Cook*³ may most conveniently be noticed here. Plaintiff's horse was placed in a field by the defendant, an agister of cattle, with a number of heifers, the defendant knowing that a bull kept in an adjoining land had several times been found in the field, and that there was no sufficient fence to keep him out; he did not know that the bull was of a mischievous disposition. The horse was gored by the bull, and the plaintiff brought his action against the defendant as agister. The point pressed on the Court was that want of knowledge of the bull's mischievous quality justified the defendant in putting the horse in the field. It was answered that the action was on a contract to take care of the horse, and that the defendant took such bad care of it that it was killed. The Court sustained the claim, Blackburn, J., saying:⁴ "It is a question of fact whether he [the defendant] took sufficient care or not, and the doctrine of *scienter*, which, as I have said, depends mainly upon authority, ought not to be extended to a contract to take reasonable care." The same law has been laid down in the United States.⁵

Simson v.
London
General
Omnibus
Company.

*Simson v. London General Omnibus Company*⁶ had previously

¹ Per Willes, J., 13 C. B. N. S. 430, at 441.

² *Lee v. Riley*, 18 C. B. N. S. 722, is distinguishable from this class of cases on the ground that the defendant's mare was trespassing as against the plaintiff, and the injury was not too remote.

³ 1 Q. B. D. at 79, at 82. "Knowledge of the fierceness of the animal, called in pleading the *scienter*, was long ago held to be necessary. There is a case in Dyer's Rep. 25 pl. 162, where it was so held, and in the margin of that case there are references to earlier authorities in the Year Books and to the Book of Exodus, c. xxi. v. 29," per Blackburn, J., at 82. The report in Dyer is as follows: *Nota que in evidence a un enquest, fuit agrée per Fitzherbert et Shelley, que si homme ad un chien que tua brebits, le master del chien esteant ignorant de tiel condition et property del chien, le master ne serra puny pur cest tuer, autrement est s'il ad notice del condition le chien.* This case was decided in 1537.

⁴ 1 Q. B. D. 79, at 83.

⁵ *Sargent v. Slack*, 19 Am. R. 136.

⁶ L. R. 8 C. P. 390. *Patterson v. Kidman*, 8 N. S. W. R. (Law) 488.

been decided on similar grounds. Plaintiff, while travelling in an omnibus of the defendants, was injured by a blow from the hoof of one of the horses, which kicked through the front panel. The Court said the mere fact of the horse having kicked was *prima facie* evidence for the jury. The case for the plaintiff was, however, placed on a breach of duty in the defendants not using reasonable care to make their carriages safe, and it was argued (and successfully) that in such circumstances the happening of an accident is sufficient to call for an answer. This point of view evidently differs from the common case of a horse kicking. There the ownership and user of the animal is lawful, and the duty to keep him from kicking only arises where it is shown that he *has* kicked or is *inclined* to kick, while the contractual duty to carry with reasonable care is absolute.¹

In *Tillet v. Ward*² the law was considered to be clear that, while the owner of sheep or cattle which are placed in a field is bound to keep them from trespassing on the land of his neighbours, he is not responsible for any injury they do when on the highway, being lawfully driven along it. The same latitude is extended to injuries done by cattle, where the owner is not negligent, to property adjoining the highway.³ The test of negligence is whether a reasonable time has or has not elapsed for their removal. In *Tillett v. Ward*² it is said there is "no solid distinction between the case of an animal straying into a field which is unfenced or into an open shop in a town."

The Scotch case of *Harpers v. North of Scotland Railway Company*⁴ treats of the rule of diligence to be observed in safeguarding cattle going through a public thoroughfare. A bull was being led through the streets secured by a ring in its nose, with a rope attached thereto, and by a halter upon its head. It was irritated by boys in the street, and struggled; the ring in its nose broke through a latent defect; the animal escaped and injured a passenger, who claimed damages for his injury. In argument the earlier cases of *Burton v. Moorhead*⁵ and *Hennigan v. M'Vey*⁶ were cited, and distinguished, since the injuries in those cases were caused by a "ferocious dog" and "a boar" respectively. The reason of the judgment in both case was that a person keeping such animals did it at his own risk. *Phillips v. Nicoll*⁷

Tillett v. Ward.

Scotch case :
Harpers v. North of Scotland Railway Company.

¹ *Villiers v. Avey*, 3 Times L. R. 812, was a case independent of contract.

² 10 Q. B. D. 17, per Stephen, J., at 21. Cp. a case cited in *Mitten v. Faudrye*, Poph. 161.

³ *Goodwyn v. Cheveley*, 4 H. & N. 631. The case at *Nisi Prius* is reported, 1 F. & F. 313. Cp. *Bourchier v. Mitchell*, 17 Vict. L. R. 27.

⁴ 13 Rettie 1139; *Linnehan v. Sampson*, 126 Mass. 506.

⁵ 8 Rettie 892.

⁶ 9 Rettie 411.

⁷ 11 Rettie 592.

was also distinguished, on the ground that the peculiar circumstances tending to excite the cow which did the injury in that case required special caution to be taken. The cow had been confined for some time in a slaughter-house, which, there was evidence, had great effect in exciting such animals, and thus put their keepers to use special precautions. The majority of the Court considered that the method of driving the bull through the street in *Harpers v. North of Scotland Railway Company*, being the usual way, and reasonably safe, the law did not impose any higher duty—that is, if the animal were in a normal condition. The Lord Justice-Clerk (Moncreiff) dissented, because “when the animal is a bull, which is always known to be subject to paroxysms of sudden fury, and when furious so much more dangerous than the animals in question in those cases,¹ I am of opinion that, when allowed to go into the streets and crowded thoroughfares, it can be considered in no other light than that of a wild animal, and that the person who brings it there is responsible that the conditions under which it is so brought shall render it absolutely safe.” This, however, is not the view of the law of England,² nor yet the law of Scotland, if Lord Justice-Clerk Inglis’s statement of the law is sound. “Can we affirm,” he says, “in this country, where the breeding of cattle is of so much importance, that the owners of bulls are under an obligation to treat them as wild beasts, and in such a way as greatly to interfere with the breeding of cattle? There is no authority for that. I hold that the owner of a bull is only bound to use a reasonable discretion, and is not bound to confine it unless when it has shown some more than ordinary vicious propensity.”³

III. Animals which never lose their wild nature.

III. Animals that in their state of domestication never wholly lose their wild natures and destructive tendencies; and are kept either for uses which depend on retaining those native instincts, or else for the whim and gratification of the owner.⁴

This class of animals includes dogs, cats, squirrels, parrots, singing birds, ferrets,⁵ and “other creatures kept for whim and pleasure,” which, says Blackstone,⁶ “though a man may have a base property therein, and maintain a civil action for the loss of

¹ *I.e.*, *Burton v. Moorhead*, 8 Rettie 892; *Phillips v. Nicoll*, 11 Rettie 592.

² *Hudson v. Roberts*, 6 Ex. 697.

³ *Clark v. Armstrong* (1862), 24 Dunlop 1315, at 1320. The same subject is treated from a Victorian point of view in *Scott v. Edington*, 14 Vict. L. R. 41, where the consideration of what class of facts will satisfy the *onus* of shewing *scientia* is gone into.

⁴ See as to this *Harper v. Marcks* (1894), 2 Q. B. 319, per Wright, J., at 323.

⁵ *Rex v. Searing, Russ & R.* (Cr. Cas.) 350; *Bac. Abr. Game*. Deer in a park may be so reclaimed as to pass to executors: *Morgan v. Abergavenny*, 8 C. B. 768; *ante*, 634.

⁶ 4 Comm. 236.

them, yet they are not of such estimation that the crime of stealing them amounts to larceny.”¹

The test whether an animal belongs to the class of wild or tame animals must be referred to our knowledge of their habits derived from experience.² If the animals are of wild nature, the owner is not liable for their trespasses as he is for those of his cattle.³ This, in fact, constitutes the chief distinction between animals that are “valuable property” and those that are tame, but in which by common law a valuable property is not admitted, viz.—that for the trespasses of the one class the owner is liable, while for the trespasses not provoked by him of the other sort he is excused.⁴ A dog, however, may be seized damage feasant while trespassing,⁵ though not shot,⁶ even when running after a hare in another man’s ground,⁷ unless the place is a preserve, and there is no other way of saving the game,⁸ or preventing further molestation.⁹

The same rule applies to the other animals in this class. Although they are not valuable property at common law, any interference with them may amount to a civil injury, and be redressed by a civil action¹⁰ in the same manner as with other property.¹¹ They differ from the class we have been considering in,

Interference with this class of animals a civil injury.

¹ Regina v. Robinson, Bell C. C. 34; Wright v. Ramscot, 1 Notes to Wms. Saund. 108. See now Larceny Act, 1861 (24 & 25 Vict. c. 96), ss. 18, 19, 20, 21, 22, 23; Brown v. Giles, 1 C. & P. 118, and the cases cited in the note.

² Puf. 4, c. 6, § 5. Filburn v. People’s Palace and Aquarium Company, 25 Q. B. Div. 258.

³ Mitten v. Fandrye, Poph. 161; Read v. Edwards, 17 C. B. N. S. 245. Cp. Sanders v. Teape, 51 L. T. 263.

⁴ Mason v. Keeling, 12 Mod. 332; Smith v. Cook, 1 Q. B. D. 79.

⁵ Boden v. Roscoe (1894), 1 Q. B. 608; Bunch v. Kennington, 1 Q. B. 679. The plaintiff has either the remedy by action or may distrain an animal taken damage feasant. If he elect the latter remedy, he must at his peril find a proper pound and in proper condition: Bignell v. Clarke, 5 H. & N. 485.

⁶ Corner v. Champneys, cited *arguendo* Deane v. Clayton, 2 Marsh. 577, at 584, 7 Taunt. 489.

⁷ Vere v. Cawdor, 11 East 568; Janson v. Brown, 1 Camp. 41.

⁸ Read v. Edwards, 17 C. B. N. S. 245.

⁹ Protheroe v. Matthews, 5 C. & P. 581, with the notes; Kellett v. Stannard 4 Ir. Jur. 50. Cp. Aldrich v. Wright, 53 N. H. 398. *Viu. Abr. Trespass L. (a)* Where trespass is justifiable.

¹⁰ 2 Bl. Comm. 393. Amongst the ancient Britons cats were looked upon as “creatures of intrinsic value.” See the curious note in Blackstone to the passage just quoted. In Whittingham v. Ideson, 8 Upp. Can. L. J. 14 A, having a property in a cat which strayed from his premises and was killed by B, was held entitled to recover, in an action for damages, something beyond the market value of the thing destroyed if the destruction were attended with circumstances of aggravation.

¹¹ 2 Kent, Comm. 348, citing ‘The Case of Swans, 7 Co. Rep. 15 a. In Finch’s Law, at 176, is the following:—“The ownership of a chattel personal is termed a property which of wild beasts, both fowls of the air, fishes in the sea, beasts upon the earth, and generally all fowls of warren, feasants, partridges, deer, conies, hares, and such-like cannot be in any; and therefore it is no felony to steal them; and a writ of trespass shall be *quare warrenam suam intravit et mille lepores cepit* without saying *suos*; nor after they are made tame, longer than they remain in one’s possession. As my tame hound that followeth me, and is with my servant; my hawk that is flying at a foul; my deer that is chased out of my park or forest; and the forester maketh fresh suit;

this, that they "are no longer the property of a man than while they continue in his keeping or actual possession; but if at any time they regain their natural liberty, his property instantly ceases, unless they have *animus revertendi*, which is only to be known by their usual custom of returning,¹ a maxim which is borrowed from the civil law: ² *Revertendi autem animus videntur desinere habere cum revertendi consuetudinem deseruerint.*"³

Knowledge of
a fierce and
vicious nature.

We have seen, in treating of the class of animals which are valuable property, that the knowledge of their owner that they are of a fierce and vicious nature or habit is necessary to fix him with liability. This rule holds good with the class we are now considering.⁴ Still, the keeping of a fierce and vicious dog with knowledge is not in itself unlawful.⁵ Thus, in *Brock v. Copeland*,⁶ Lord Kenyon held that a man has a right to keep a dog for the preservation of his house, and where the dog has been properly let loose, and injury has arisen from the plaintiff's own fault, he cannot recover.

Brock v.
Copeland.

Sarch v.
Blackburn.

This was accepted in *Sarch v. Blackburn*⁷ before Tindal, C.J., at *Nisi Prius*; the Chief Justice saying: "If a man puts a dog in a garden, walled all round, and a wrongdoer goes into that garden, and is bitten, he cannot complain in a Court of Justice of that which was brought upon him by his own act. . . . Undoubtedly a man has a right to keep a fierce dog for the protection of his property, but he has no right to put the dog in such a situation in the way of access to his house, that a person innocently coming

these all remain in my possession, and the property is in me; but if they stray it is lawful for any man to take them. Otherwise it is of hens, capons, geese, ducks, peacocks, &c." Cp. the distinction before noted between animals *mansuetæ naturæ* and *mansuefactæ naturæ*. Pigeons if tame and unreclaimed may be subjects of larceny although not in a state of confinement, but living in an ordinary dovecote which gives them free access at their pleasure to the open air; *Regina v. Cheafor*, 21 L. J. M. C. 43.

¹ *Rex v. Brooks*, 4 C. & P. 131.

² Inst. 2, 1, 15. *In his autem animalibus quæ ex consuetudine abire et redire solent, veluti columbis et apibus, item cervis qui in silvas ire et redire solent, talem habemus regulam traditam, ut si revertendi animus habere desierint, etiam nostra esse desinant et fiant occupantium, revertendi autem animus videntur desinere habere cum revertendi consuetudinem deseruerint*: Gaius 2, § 68.

³ 2 Bl. Comm. 392.

⁴ *Ante*, 632. *Card v. Case*, 5 C. B. 622; *Fleeming v. Orr*, 2 Macq. (H. L. Sc.) 14.

⁵ *Beck v. Dyson*, 4 Camp. 198. Cp. *Jones v. Perry*, 2 Esp. (N. P.) 482, *ante*, 636.

⁶ 1 Esp. (N. P.) 203, cited *Bird v. Holbrook*, 4 Bing. 628, at 638.

⁷ 4 C. & P. 297, where it was also said that a printed notice that a ferocious dog was tied up near was not enough, since the person bitten might not be able to read. See also *Curtis v. Mills*, 5 C. & P. 489; *Sylvester v. Maag*, 155 Pa. St. 225; 35 Am. St. R. 878. *Bird v. Holbrook*, 4 Bing. 628, has some points of analogy; it proceeds from the position that setting spring-guns without a notice was, even independently of the statute, an unlawful act. "The correctness of that position may perhaps be questioned": *Jordin v. Crump*, 8 M. & W. 782, per Alderson, B., at 789. The rule there stated is: "The law in certain cases makes an exception to the right of setting instruments capable of causing deadly injuries to human life, where such injury will be a probable consequence of setting them; but with the exception of those cases, a man has a right to do what he pleases with his own land," see *ante* 505 *et seq.* As to law of Scotland, see *Daly v. Arrol*, 24 Sc. L. R. 150.

for a lawful purpose may be injured by it." The *dictum* of Lee, C.J., in *Smith v. Pelah*,¹ is not now law, "that if a dog has once bit a man, and the owner having notice thereof lets him go about or lie at his door, an action will lie against him by a person who is bit, though it happened by such person treading on the dog's toes, for it was owing to the defendant not hanging the dog on the first notice, and the King's subjects ought not to be endangered." As Cresswell, J., says, in *Charlwood v. Greig*,² "Our criminal law has been much modified since that time, and that would not now be considered as a proper mode of proceeding." In *Line v. Taylor*,³ it having been proved that a dog had previously sprung upon people, and on one occasion torn the collar of a man's coat, though "it did not appear that on either occasion the dog really meant to bite or to inflict a wound, as from his size and strength he easily could have done had he meant so to do," the dog was produced in court, when the jury "examined him, and appeared to be of opinion that, from the expression of his eye and other indications, he was not of a vicious disposition," and a verdict was given for the defendant. Yet in *Worth v. Gilling*,⁴ where the dog had shewn a savage disposition to the knowledge of his owner, and a verdict was given for the plaintiff, the Court refused a rule moved for on the ground that, though fierce, the dog had not actually bitten any one.

Dictum of Lee, C.J., in Smith v. Pelah.

Comment by Cresswell, J., in Charlwood v. Greig.

Line v. Taylor.

Worth v. Gilling.

The decision of the Second Division of the Court of Session, in *Burton v. Moorhead*,⁵ is questionable; for it is there laid down that a man keeping "a powerful and ferocious dog of a most savage character and that had bitten several people," "keeps it at his own risk, and the precautions he takes must be effectual"; for it is plain from the foregoing cases that the keeping a ferocious dog is not unlawful, and that being so, to found an action some circumstance of blame must be proved, while the fact that precautions were not effectual does not necessarily connote blame. But at the date of this decision some of the members, at any rate, of the Second Division of the Court of Session, were not a little

Burton v. Moorhead.

¹ 2 Str. 1264. See *post*, 648 note. Cp. *Jones v. Perry*, 2 Esp. (N. P.) 482, where evidence of a common report that the dog was mad was admitted. The report of this case in Peake, *Law of Evidence*, § ii. Actions founded in Negligence, 290, at 292, is very different from that in *Espinasse*. There Lord Kenyon seems to have held that, where a child had died from hydrophobia, brought on by the bite of a mad dog, the father could maintain an action for the expenses of the apothecary.

² 3 C. & K. 46. In Scotland the Lord Justice-Clerk engrafts an exception on the law in the case of friends visiting with knowledge of a vicious dog being on the premises, for which, however, he cites no authority: *Smillie v. Boyd*, 24 Sc. L. R. 148, at 150.

³ 3 F. & F. 731. In 35 J. P. 813 it is said that a dog in the habit of flying at horses and carriages so as to render an accident probable would be a dangerous dog.

⁴ L. R. 2 C. P. 1. *Fraser v. Bell*, 24 Sc. L. R. 583, was only a decision that the case should go to proof.

⁵ (1881) 8 Rettie 892.

zealous against the injurious acts of animals whether oxen or dogs.¹

Knowledge
either directly
communicated
or imputed
from circum-
stances.

Knowledge of vicious or savage propensity may be either directly communicated to the defendant or may be imputed to him from circumstances. With regard to what may be held imputed knowledge, there has been some little difficulty with the decisions. These we shall now proceed to consider.

Stiles v.
Cardiff Steam
Navigation
Company.

The first is *Stiles v. Cardiff Steam Navigation Company*.² Plaintiff went on defendants' premises to take away his luggage; not finding it in the place appropriate, he went to the other side of the road, where there were persons of whom he could inquire. As plaintiff was coming back a dog sprang out and bit him. Of the disposition of the dog the only evidence was, that "on some former occasion some of the servants had heard, and perhaps one of them had seen, the dog spring upon and bite some one else." The Court was "clearly of opinion that the company were guilty of negligence"; and also, as regards liability, that there was "no difference between a corporation and an individual." As to the

Crompton, J.

question of the *scientia*, Crompton, J., said: "I quite agree that the knowledge of a servant representing his masters, and acting within the scope of their delegated authority, may be competent to affect his masters with that knowledge [of the vicious disposition]. But is it found in this case that any such persons had knowledge, persons competent to bind the defendants by their admissions, for such evidence is in the nature of an admission? No doubt there must be some such person, for there must have been some one on the premises to control the business of the defendants. It would have been sufficient to shew knowledge in the manager, or in some person having the control of the yard. I had some doubt whether the knowledge must not be brought home to some person who kept and had care of the dog, and had power to put an end to the keeping of it, but perhaps it would be enough if he had the care of the dog. But all that was found is that some persons, who appear rather to have had the care of the horses, had seen or had heard that the dog had bitten a person before. It is more like the case of a gardener or a cook hearing that their mistress's lap-dog was given to bite, and I think that the evidence wholly fails to bring home the knowledge to any person whose knowledge in point of law would be that of the defendants."

¹ In *Hubbard v. Preston*, 30 Am. St. R. 426, a right was successfully asserted "to kill barking, quarrelling, and fighting dogs become a nuisance"; but there the occurrences complained of were habitual, not casual. There is no right to kill a dog merely because one is annoyed with his barking. Cp. *Ten-Hopen v. Walker*, 35 Am. St. R. 598.

² 33 L. J. Q. B. 310. As to knowledge of viciousness of dog apart from the fact of its having actually bitten any one, *Knowles v. Mulder*, 16 Am. St. R. 627.

The next case is *Gladman v. Johnson*,¹ where evidence of knowledge was held to be given by proof that a complaint of the dog had been made to the wife of the defendant—a milkman—the wife attending to the business in the absence of her husband. This was followed by *Baldwin v. Casella*,² in the Exchequer, where the opinion of Crompton, J., in *Stiles v. Cardiff Steam Navigation Company*³ was referred to with approbation, yet the defendant was held liable, as “the dog was kept in the defendant’s stable, and the defendant’s coachman was appointed to keep it; the coachman knew that the dog was mischievous, and it is immaterial whether he communicated the fact to his master or not; his knowledge was the knowledge of his master.”

In the subsequent case of *Applebee v. Percy*,⁴ the whole subject was much discussed. Two persons, who had upon previous occasions (one of them twice) been attacked by a dog of which defendant was the owner, gave evidence that they had gone to the defendant’s public-house and made complaint to two persons who were behind the bar serving customers, and that one of them had also complained to the barmaid. The Court were divided on the question whether this was sufficient to affect the defendant with notice; Lord Coleridge, C.J., and Keating, J., being of opinion that it was; while Brett, J., dissented,⁵ on the ground that “it seems to me to be impossible to say that either of the persons to whom the communications respecting the dog were made in this case, was a person having the management of the business or the care of the dog, in the sense indicated in either of these cases;”⁶ and I am aware of no case in which it has been held that notice to one standing in any other relation is equivalent to knowledge of the master.” Neither was there any duty on the servants to communicate to the master, or any evidence that they had done so. The view of the majority was that they were bound by *Gladman v. Johnson*;⁷ which decision they interpreted as affirming that what is sufficient notice “must be a question of degree in each case; and that if a communication of this sort is made to one who, as in that case, was entrusted even occasionally only with the conduct of the defendant’s business, with the intent that it should come to the knowledge of the defendant,

¹ 36 L. J. C. P. 153.

² L. R. 7 Ex. 325.

³ 33 L. J. Q. B. 310.

⁴ L. R. 9 C. P. 647.

⁵ *L.o.* at 651.

⁶ *I.e.*, *Stiles v. Cardiff Steam Navigation Company*, 33 L. J. Q. B. 310, and *Baldwin v. Casella*, L. R. 7 Ex. 325.

⁷ 36 L. J. C. P. 153.

it is for the jury to say whether or not it amounts to notice to him." On one principle the whole Court was agreed. "It may be taken to be quite clear," says Lord Coleridge,¹ "that a mere notice to any servant of the owner of the dog will not do." In accordance with this in *Colget v. Norrish*² the Court of Appeal held, in a case where a collie dog rushed out of doors and bit a postman, that notice to a domestic servant was not sufficient.³

Ownership of dog not necessarily to be proved.

The ownership of the dog need not be proved to affect a defendant with liability. It may be presumed. Thus, in *M'Kone v. Wood*,⁴ it was proved that the dog was seen about the premises of the defendant; it appeared that in fact the dog was not the defendant's, and belonged to a servant of his who had left him; yet, Lord Tenterden, C.J., held it was not material whether the defendant was the owner of the dog or not—if he kept it, that was sufficient; further, that the harbouring a dog upon premises, or allowing it to resort there, was sufficient to support an action, as it was the defendant's duty either to have destroyed the dog or to have sent it away. This case was cited in *Smith v. Great Eastern Railway Company*,⁵ where the circumstances from which evidence of liability may be inferred are discussed. The case, however, turns entirely on its particular facts.

Joint injuries committed by dogs.

In America it has frequently been laid down that where two or more animals belonging to different persons commit injuries at one and the same time, the owners cannot at common law be made jointly liable. Each owner is separately liable for so much only of the damage as is done by his own animal.⁶ The only difficulty in this case arises from an ambiguity in the use of the word joint, which may indicate either co-operation or only simultaneousness. The law of England undoubtedly is that all parties engaged in a common wrongful act are liable jointly and severally.⁷ Dogs worrying sheep are not necessarily engaged in a common act; they are, perhaps, most commonly engaged at the same time and in the same place in an act that is equally wrongful in both, yet in which each acts independently and without reference to the other, and the fact of the coincidence in wrongdoing in itself would not import the co-operation necessary

¹ L. R. 9 C. P. at 655.

² Times L. R. 471.

³ See *Cleverton v. Uffernel*, 3 Times L. R. 509, a case turning on what constitutes charge of a dog.

⁴ 5 C. & P. 1; *Vaughan v. Wood*, 18 Can. S. C. R. 703.

⁵ L. R. 2 C. P. 4. The head-note of this case is justly celebrated for its unconscious humour. In *Gray v. North British Railway Company*, 18 Rettie 76, a dog escaped from the charge of a railway porter while being conveyed by the defendant company and bit a stranger.

⁶ Shearman and Redfield, *Negligence* (4th ed.), § 638 and the cases cited there.

⁷ Bullen and Leake, *Prec. of Plead.* (3rd ed.) 708.

to make the wrong a joint one.¹ In so far, then, as this is the case, each owner is liable for the source of mischief he himself should restrain, and does not. The case of two dogs of different masters coursing an animal belonging to a third person would perhaps raise the point of whether they can engage in a "common wrongful act." In that case there would be co-operation, and the damage arising would not be the act of either of them, but the result of the acts of both, for which both owners would seem to be liable.²

The case of *Lewis v. Jones*³ is an authority for the existence of very wide powers of the Court to draw inferences where an unlawful act has once been established. *Lewis v. Jones.*

It has been asked whether the fact that a dog has a habit of worrying sheep is any evidence that it is of a savage and ferocious disposition. In *Mason v. Keeling*, Gould, J.,⁴ is reported as saying, "If a dog be *assuet* to bite cows, and the master know it, that will not be sufficient knowledge to make him liable for its biting sheep." And in a well-known American treatise⁵ is the statement: "Proof of the owner's knowledge that the dog had worried sheep would not suffice, since thousands of curs, who would not dare to touch a man, delight in attacking sheep." Both the opinion and the reason on which it is based commend themselves to common sense. The "nature" of even domestic dogs is to hunt sheep unless trained, while all domestic dogs are presumed to be trained not to attack men. *Quare, whether the fact that a dog has a habit of worrying sheep is evidence of his being of a savage and ferocious disposition.*

There is a case cited in *Oliphant, Law of Horses*,⁶ where the converse was held, viz., that, where a dog four years previously had bitten a girl, an action for worrying sheep would lie at common law. This may, perchance, be correct, as reasoning from the greater to the less; though in no sort of way an authority in reasoning from the less serious act, the worrying of sheep, to the more grievous, the biting of human kind.

The common law rights of dogs have been considerably abridged by statute.⁷ *Statutory enactments.*

¹ *Auchmuty v. Ham*, 1 Denio (N.Y.) 495; *Van Steenburgh v. Tobias*, 17 Wend. (N.Y.) 562.

² See *Paget v. Birkbeck*, 3 F. & F. 683. As to dogs fighting and the circumstances in which an action will lie, see *Wheeler v. Brant*, 23 Barb. (N.Y.) 324; *Wiley v. Slater*, 22 Barb. (N.Y.) 506. ³ 49 J. P. 198. ⁴ 12 Mod. 332, at 335.

⁵ *Shearman and Redfield* (4th ed.), § 631. The work of these authors may be with great advantage consulted on the whole of the subject now being treated, §§ 626-643.

⁶ (4th ed.) 350, where this case appears as *Gething v. Morgan*, tried at *Nisi Prius* 1st May, 1857. A reference to the *Times Newspaper* of 2nd May, 1857, will shew this is inaccurate. The case was heard on Appeal from the County Court of Monmouthshire, before Lord Campbell, C.J., and Wightman, Erle, and Crompton, JJ.

⁷ This sentence has been criticized in a Scottish review of this book as an error, the privilege being "the dog's master's, not the dog's." I can only refer in my justification to the dictum of a distinguished Scottish judge; "the dog has in fact the privilege of one worry," per the Lord Justice-Clerk Moncreiff, *Burton v. Moorhead* (1881), 8 Rettie

28 & 29 Vict.
c. 60.

The decision in *Fleeming v. Orr*¹ produced the passing of 28 & 29 Vict. c. 60,² section 1 of which enacts that the owner of every dog shall be liable in damages for injuries done to any cattle or sheep by his dog, and that it shall not be necessary for the party seeking such damages to shew a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity.

Section 2 enacts that the occupier of premises where any dog is permitted to live is to be deemed the owner, unless he can prove that the dog was there without his knowledge, and that he was not the owner. In the case of plural occupancy, the owner is to be deemed to be the person in the occupancy of that particular part of the premises where the dog has been permitted to remain at the time of the injury.

In *Wright v. Pearson*³ the protection given to cattle was held to include horses.

In 1871 was also passed the Dogs Act⁴ which provides—

The Dogs
Act, 1871.

First, that any police officer or constable may take possession of any dog he has reason to suppose to be savage or dangerous straying on any highway, and not under the *control*⁵ of any person; and such dog may be detained, and sold or destroyed.⁶

Secondly, that any court of summary jurisdiction may take cognizance of a complaint that a dog is dangerous and not kept under proper control, and may order such dog to be kept under proper control or destroyed.

Thirdly, that the Act is not to affect the powers contained in section 18 of the Metropolitan Streets Act, 1867,⁷ or in any local or other Act of Parliament for the same or like purposes.

892, at 895. The common law has often been the subject of satirical reference for its liberal views as to dogs; the deliberate wisdom of the Victorian Legislature as expounded by the Supreme Court may well serve as a foil to it. In *Regina v. Hare, Ex parte Schneider*, 14 Vict. L. R. 89, the facts shewed that a boy on defendant's premises, after wantonly exasperating a dog, struck it and was bitten by it. The Court, notwithstanding, held that by the terms of The Colonial Dog Act, 1884, "evidence to shew that the dog was of a quiet disposition, or that the owner was ignorant of its mischievous disposition, was inadmissible."

¹ 2 Macq. (H. L. Sc.) 14.

² The Scotch Act is 26 & 27 Vict. c. 100, and is much more meagre in its terms than the English Act. *M'Intyre v. Carmichael*, 8 Macph. 570, is a decision on its interpretation.

³ L. R. 4 Q. B. 582; *Cowell v. Mumford*, 3 Times L. R. 1.

⁴ 34 & 35 Vict. c. 56.

⁵ Control is a question of fact, and, in the absence of positive evidence, that a dog is unmuzzled and not led is sufficient to prove that it was not under proper control; In the Matter of an Application for a Rule for a Mandamus, 3 Times L. R. 24.

⁶ Whether sold or destroyed is at the option of the justices: *Pickering v. Marsh*, 43 L. J. M. C. 143.

⁷ 30 & 31 Vict. c. 134. Section 18 provides for taking possession of any dog found in the streets and not under control; also for regulations as to muzzling, selling, or destroying. *McKay v. City of Buffalo*, 9 Hun. (N. Y.) 401, affd. (1876) 74 N. Y. 619, is a curious case of an action brought against a municipal corporation for the negligence of a policeman in shooting a dog supposed to be mad.

IV. Animals *feræ naturæ* and unreclaimed.IV. Animals
feræ naturæ
and unre-
claimed.

The common law includes in this class only those animals which are native to the country. Imported savage beasts, as lions and the rest, come under a different class of obligations; while bears and other such savage beasts once common, though now as indigenous animals extinct, are also exceptionally regarded.¹

By the civil law the person who captures any animal *feræ naturæ* acquires the property in it.² Such is not the law of England.³ The law of England agrees with the civil law to the extent of holding that in wild animals not captured there is a qualified property as long as they remain on land.⁴ When, then, a wild animal is killed or caught on land, the animal so killed or caught, by the law of England becomes the absolute property of the owner of the soil; unless the land is subject to the franchise anciently granted by the Crown in virtue of its prerogative, whereby a right was given to one man of killing and taking animals *feræ naturæ* on the land of another, when they become the property of the owner of the franchise.⁵

While game remains on the land of any particular landowner he has a property in it, dependent on its continuance there. So soon as it strays his property is gone. If it is killed on his land his property becomes absolute; if it is killed off his land while voluntarily straying, he has no property whatever. If, however, it be driven off by a trespasser and killed on another man's land, Holt, C.J., in the case of *Sutton v. Moody*,⁶ was of opinion that the property should be in the trespasser. Lord Chelmsford, on the other hand in *Blades v. Higgs*,⁷ thought

Property in
game.¹ *Ante*, 609.² D. 41, 1, 5, § 1.³ Com. Dig. Biens (F) What things are *nullius in bonis*. *Feræ naturæ*.⁴ The owner of the soil may grant a right to others to come and take them by a grant of hunting, shooting, fowling and so forth, per Lord Campbell, *Ewart v. Graham*, 7 H. L. C. 331, at 344; *Wickham v. Hawker*, 7 M. & W. 63. The English law as to "Game" is exhaustively treated in Burn, Justice, *sub voce*, also in Bac. Abr. As to the meaning of the term see per Erle, C.J., *Jeffries v. Evans*, 34 L. J. C. P. 261, at 263; 1 & 2 W. IV. c. 32, s. 2; *Spicer v. Barnard*, 1 E. & E. 874; *Padwick v. King*, 29 L. J. M. C. 42.⁵ *Blades v. Higgs*. 11 H. L. C. 621, where the whole matter is considered. See *Falkland Islands Company v. Regina*, 2 Moo. P. C. C. N. S. 266. "If," says King, C.J., "a man shoots at a wild fowl, wherein no man hath any property, and by such shooting happens unawares to kill a man, this homicide is not felony, but only a misadventure or chance medley, because it was an accident that happened in the doing of a lawful act; but if this man had shot at a tame fowl wherein another had property, but not with intention to steal it, and by such shooting had accidentally killed a man, he would then have been guilty of manslaughter because done in prosecution of an unlawful action, viz., committing a trespass on another's property; but if he had had an intention of stealing this tame fowl, then such accidental killing of a man would have been murder, because done in prosecution of a felonious intent, viz., an intent to steal:" *Woodburn's Case*, 16 How. St. Tr. 80.⁶ 1 Ld. Raym. 250; *Churchward v. Studdy*, 14 East 249. Bac. Abr. Game.⁷ 11 H. L. C. at 639.

that the ownership would rather be in him on whose land the animal was killed.¹ "Almost all the jurists on general jurisprudence agree," says Kent,² "that the animal must have been brought within the power of the pursuer before the property in the animal vests." This is of course with reference to *feræ naturæ* apart from the claim of the owner of the land. In *Pierson v. Post*³ it was accordingly held that an action would not lie against one for killing and taking a fox which had been pursued by another, and was then actually in the view of him who had originally started and chased it. Actual taking is not requisite, but possession must be so far established that the animal cannot escape, before a pursuer can assert any legal right in his quarry.⁴

Damage done
by animals.

For damages done by animals *feræ naturæ* the landowner who harbours them is not liable. As is said in *Boulston's case*,⁵ "for as soon as the coneys come on his neighbour's land he may kill them, for they are *feræ naturæ*, and he who makes the coney borough has no property in them, and he shall not be punished for the damage which the coneys do in which he has no property, and which the other may lawfully kill."⁶ Nevertheless, a man is liable for bringing excessive quantities of rabbits or game on land, when these injure the crops of a neighbour, or of the agricultural tenant, even when sporting rights are reserved.⁷ He is liable on the ground that his user of his land creates a nuisance. His act produces injury. In *Boulston's case* the damage arose from a refusal to act.

¹ One who finds game on his own ground cannot pursue it into the land of another; *Deane v. Clayton*, 7 Taunt. 489; 2 Marsh. 577.

² 2 Comm. 349. Cp. Puf. 4, 6, 5.

³ 3 Caines (N. Y.), 175 (Livingston, J., dissenting at 179), and followed in *Buster v. Newkirk*, 20 Johns (N. Y. Sup. Ct.) 75. The custom in the Greenland whale fishery is the whale belongs to the first striker only so long as his harpoon is in the whale and under his control: note to *Fennings v. Lord Grenville*, 1 Taunt. 241. See *Aberdeen Arctic Company v. Sutter*, 4 Macq. (H. L. Sc.) 355, and the case in the Year Book 12 Hen. VIII. 9 pl. 2, cited *ante*, 630.

⁴ *Illud quæsitum est, an, si fera bestia ita vulnerata sit, ut capi possit, statim tua esse intellegatur. Quibusdam placuit, statim tuam esse et eo usque tuam videri, donec eam persequaris; quodsi desieris persequi, desinere tuam esse et rursus fieri occupantia. Alii non aliter putaverunt tuam esse quam si ceperis. Sed posteriorem sententiam nos confirmamus, quia multa accidere solent, ut eam non capias, Inst. 2, 1, 13. Plerique non aliter putaverunt eam nostram esse, quam si eam ceperimus; quia multa accidere possunt, ut eam non capiamus; quod verius est: D. 41, 1, 5, § 1.*

⁵ 5 Co. Rep. 104 b, limited by *Birkbeck v. Paget*, 31 Beav. 403, which was followed, *Farrer v. Nelson*, 15 Q. B. D. 258.

⁶ See "The Rooks Case," *Hannam v. Mockett*, 2 B. & C. 934. The judgment in *Aldrich v. Wright*, "The Mink Case," 53 N. H. 398, contains all the authorities on the subject of killing wild vermin in defence of property. This was an action to recover penalties under a statute for killing minks in the close time. The defendant admitted the killing of four minks, but alleged in justification that he honestly believed the animals were at the time pursuing his geese. This was held a legal excuse.

⁷ *Farrer v. Nelson*, 15 Q. B. D. 258; *Birkbeck v. Paget*, 31 Beav. 403; *Hilton v. Green*, 2 F. & F. 821.

CHAPTER VI.

COLLISIONS ON LAND.¹

IN natural course we should now proceed to consider the duty of an owner of property to prevent a collision with the property of others whether on land or on water. But since in a subsequent portion of this work we shall be largely concerned with inquiring into the special relations of carriers by water, that part of our subject which deals with collisions on water will be postponed for the more convenient grouping of all matters relating to water carriage. Here, accordingly, we shall discuss collisions on land only.

We have already referred to the *dictum* of Blackburn, J., in *Fletcher v. Rylands*,² that "traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger."

In these cases, they cannot recover without proof of want of care or skill occasioning the accident;³ since for a pure accident there is no liability.⁴ Still there are certain rules necessary for the fullest enjoyment of the highways which we are now to consider, and the lack of observance of which, in riding or driving constitutes evidence of that negligence which the law requires in these cases in order to affix liability for an accident occurring on a highway.

The custom or law of the road is that horses and carriages should respectively keep on the near or left side, and foot passengers take the right hand—and this is judicially recognized

¹ The consideration of collisions on water, which naturally falls to be treated here, is postponed, and treated in connection with common carriers by sea.

² See *ante*, 550; L. R. 1 Ex. 265, at 286. Cp. *River Wear Commissioners v. Adamson*, 2 App. Cas. 743, at 767.

³ *Manzoni v. Douglas*, 6 Q. B. D. 145; *Holmes v. Mather*, L. R. 10 Ex. 261.

⁴ *Wakeman v. Robinson*, 1 Bing. 213; 8 Moo. (C. P.) 63; *Gibbons v. Pepper*, 1 Ld. Raym. 38.

without proof.¹ This rule was laid down in all its generality before tramcars were an incident of the road. In Scotland the Lord President (Inglis) has since expressed an opinion that the introduction of tramways requires a new rule of the road, that a tram-car should be passed by a following vehicle on the left-hand side, and, in the circumstances in which he enunciated the rule, it seems one generally applicable.²

Person riding
or driving not
absolutely
bound to keep
his side.

The person riding or driving is not *bound* to keep his side; yet if he does not, he must keep a better look-out to avoid collision than would be necessary if he were on the proper part of the road.³ The mere fact of a man driving on the wrong side of the road is, *per se*, no evidence of negligent driving in an action brought for running over a person who was crossing the road on foot.⁴ Of course, the fact that a person is driving on the wrong side of the road does not justify another in wantonly injuring him; and if the road is of sufficient breadth, it is incumbent on any person coming the other way "to take that course which would carry him clear of the person who was on his wrong side," and in the event of an injury happening from his acting otherwise he will be liable to the person so riding or driving on the wrong side.⁵

Circumstances
may warrant
a deviation
from the rule.
Wayde v.
Carr.

Again, circumstances may warrant a deviation from the law of the road; as is said in *Wayde v. Carr*,⁶ "In the crowded streets of a metropolis . . . situations and circumstances might frequently arise where a deviation from what is called the law of the road would not only be justifiable, but absolutely necessary."

¹ The rule is best known in the following doggerel rhyme:

"The rule of the road is a paradox quite,
As I think you will see by this song;
For if you go *left* you go *right*,
And if you go *right* you go *wrong*."

It has also been put into Latin as follows:—

*Sed precor hoc posthac reminiscere carpe sinistram,
Dextram occurenti linquere norma jubet.*

On some parts of the Continent and in America the rule is the other way, travellers, vehicles, and animals under the charge of man all taking the right when meeting, if it is reasonably practicable to do so. The "Customary Rules for Driving" are given in 2 Steph. N. P. 984; the note 1 Taylor, Evidence (8th ed.), 7, may also be referred to. See further Oliphant on Horses (4th ed.), 294-346.

² *Jardine v. Stonefield Laundry Company*, 14 Rettie, 839, and see *post*, 658. In Scotland by 41 & 42 Vict. c. 51, s. 123 (Sch. C.), incorporating 1 & 2 Will. IV. c. 43, s. 97, the law is that "if the driver of any sort of carriage shall not keep to the left or near side of any such (*i.e.*, turnpike) road on meeting or on being overtaken by any other carriage or any rider, or shall wilfully prevent any other person passing him or his carriage, such driver shall for every such offence forfeit and pay a sum not exceeding £5 over and above the damages occasioned thereby."

³ *Pluckwell v. Wilson*, 5 C. & P. 375.

⁴ *Lloyd v. Ogleby*, 5 C. B. N. S. 667; *Aston v. Heaven*, 2 Esp. (N. P.) 533.

⁵ *Clay v. Wood*, 5 Esp. (N. P.) 44; *Turley v. Thomas*, 8 C. & P. 103.

⁶ 2 D. & R. 255; see, too, per Coleridge, J., *Turley v. Thomas*, 8 C. & P. 103.

In general the rule holds, and applies not merely to horses drawing carriages, but to saddle horses,¹ and to any other animal in similar circumstances.² Though there is one case, not unambiguously reported, which seems to bear another construction,³ the fact that a person driving is on the wrong side of the road indicates carelessness, and hence *prima facie* points to negligence.⁴ Any other view would be destructive of the rule; for if conformity does not raise a presumption of right conduct, observance or disobedience of the rule becomes absolutely indifferent in the case of an action; as negligence having to be shewn apart from the rule, the rule would be neutralized. If conformity to the rule is presumptively going right, non-conformity would seem presumptively to be not going right.⁵ This *prima facie* presumption is rebuttable; so that in the case of a man, driving on his wrong side, colliding against another traveller, the *prima facie* presumption is rebutted by proof that, there being ample room for both, the other traveller insisted on occupying that portion of the way along which the person on his wrong side was driving.⁶ Being on his wrong side, a traveller must leave more than barely enough room for other travellers.⁷ It is matter of evidence for the jury whether the accident arose from want of sufficient room. As was said by Rooke, J.,⁸ "the driver was not to make experiments; he should leave ample room, and if an accident happened from want of that sufficient room he was no doubt liable;" and he has no right by his conduct to impose on other people using the road any greater exertion of care and skill than they would have had to exert had he seen fit to conform to the general rule of travelling.⁹ In the case of a fog, or at night, the rule must be strictly observed, even though no other people appear to be on the road.¹⁰

The rider or driver of a horse is required to have a competent knowledge of horses and adequate skill in their management—that is, that knowledge and that degree of care which prudent men exercise, or should exercise, in similar matters. If the defendant's act fall below the standard, he is liable, though not unless.¹¹

Duty of rider
or driver of
a horse.

¹ Turley v. Thomas, 8 C. & P. 103.

² Shearman and Redfield, Negligence (4th ed.), § 644, n.

³ Wayde v. Carr, 2 D. & R. 255.

⁴ Burdick v. Worrall, 4 Barb. (N. Y.) 596.

⁵ Chaplin v. Hawes, 3 C. & P. 554; Mayhew v. Boyce, 1 Stark (N. P.) 423.

⁶ Per Patteson, J., Reed v. Tate, cited Oliphant, Law of Horses (4th ed.), 328; Clay v. Wood, 5 Esp. (N. P.) 44; Cruden v. Fentham, 2 Esp. (N. P.) 685.

⁷ Chaplin v. Hawes, 3 C. & P. 554.

⁸ Wordsworth v. Willan, 5 Esp. (N. P.) 273.

⁹ Pluckwell v. Wilson, 5 C. & P. 375; Brooks v. Hart, 14 N. H. 307, where the law is laid down clearly and at length.

¹⁰ Cruden v. Fentham, 2 Esp. (N. P.) 685.

¹¹ Bigelow, L. C. on Torts, 595. It has been held not negligence *per se* for a one armed man to drive a horse: Reynolds v. Hanrahan, 100 Mass. 313.

without proof.¹ This rule was laid down in before tramcars were an incident of the road. Lord President (Inglis) has since expressed introduction of tramways requires a new tram-car should be passed by a following side, and, in the circumstances in which seems one generally applicable.²

Person riding or driving not absolutely bound to keep his side.

The person riding or driving yet if he does not, he must collision than would be necessary of the road.³ The mere side of the road is, *per se*, action brought for running road on foot.⁴ Of course wrong side of the road injuring him; and incumbent on any course which would his wrong side, his acting otherwise driving on the

Circumstances may warrant a deviation from the rule. *Wayde v. Carr*.

Again, if a driver inflicts injury on a passer-by, if the driver of the carriage is the peculiarity of character which results in the not negligently ignorant of it.⁵ If, however, a vicious horse, spurs it when close to a bystander, the rider is guilty of the same. If a horse kicks out and injures him, the rider is guilty of the same. The pace at which a horse is driven should be moderate; and reckless driving which frightens a horse so that he runs away, to the injury of the plaintiff's property, has been held in New York to constitute a cause of action, even though no actual collision has resulted.⁶

What is too rapid driving is, however, a question dependent upon circumstances. A rate of speed allowable in driving along a country lane would be excessive and dangerous in the city of London.⁷

¹ 2 Taunt. 314. The fact that the driver of a carriage was intoxicated when he ran against the plaintiff is some evidence that he was negligent: *Wynn v. Allard*, 5 Watts & S. (Pa.) 524; the evidence so given is, however, not to be used to inflate damages.

² *Larrabee v. Sewall*, 66 Me. 376; *Jones v. Boyce*, 1 Stark. (N. P.) 493.

³ *Hammack v. White*, 11 C. B. N. S. 588; cp. *Michael v. Alestree*, 2 Lev. 172.

⁴ *North v. Smith*, 10 C. B. N. S. 572.

⁵ *Butterfield v. Forrester*, 11 East 60; *Payne v. Smith*, 4 Dana (Kentucky) 497. the Chief Justice says: "He who is so unmindful of the peace and security of others as to ride or drive in a gallop or rapid trot or pace, through a crowded city or town, is held by the common law responsible for all damage that any other person, *without fault*, shall sustain in consequence of such voluntary and perilous imprudence."

⁶ *Burnham v. Butler*, 31 N. Y. 480.

⁷ *Reed v. Inhabitants of Deerfield*, 90 Mass. 522; *Martin v. North Metropolitan Tramways Company*, 3 Times L. R. 600 (C. A.)

of persons," said Pollock, C.B.,¹ "who are foot passengers which is at the entrance of the street, and who are to be cautious, and carefully; but it is also the duty of drivers to foot-passengers.

use due care and caution in going of a street, so as not to get injured. In all circumstances, well in hand, and look carefully careful in turning

of the driver Defect in the vehicle.

from defect in circumstance of negli-

a highway is not enough. Mere happening of an accident on a highway not evidence of negligence.

whereby to be attributed to the case of *Willes v. Grey*⁶ may at first sight seem

the action, however, was *in assumpsit* by

the case before Willes, J., was in tort by a

circumstance can be shewn which affects the

negligence in not providing good tackle, to which he

will be held liable.⁶

case of *Templeman v. Haydon*⁷ must be noticed. There Templeman v. Haydon.

plaintiff merely proved the fact of a collision; the defendant when proved that the accident arose from the horse suddenly beginning to kick, whereby the shafts of the cart were broken, the driver thrown out, and the horse, starting off, ran against and injured the plaintiff's horse. The county court judge gave judgment for the plaintiff; and stated a case on the question whether, on the evidence, the plaintiff ought to have been nonsuited or a verdict found for the defendant. "I am of opinion," says Cresswell, J., "that the plaintiff ought *not* to have been nonsuited. We are not asked to say whether the evidence warranted the verdict for the plaintiff or not." The decision is no more than an affirmation that there was some evidence in favour of the plaintiff's case.

¹ *Williams v. Richards*, 3 C. & K. 81.

² *Phelps v. Wait*, 30 N. Y. 78. The principal point decided was that a joint action will lie against the principal and agent for a personal injury caused by the negligence of the latter (in the absence of the former) in the course of his employment.

³ *Springett v. Ball*, 4 F. & F. 472.

⁴ *Doyle v. Wragg*, 1 F. & F. 7. No action will lie against the mere *driver* not the owner apart from actual negligence.

⁵ 9 Bing. 457. *Hyman v. Nye*, 6 Q. B. D. 685, was also a case of the existence of a contractual obligation. See as to this class of cases *post*, Bailments, Hire of Things.

⁶ *Welsh v. Lawrence*, 2 Chit. (K. B.) 262. No action will lie against the *driver* for injuries caused by defect in the vehicle where he has not been guilty of negligence: *Doyle v. Wragg*, 1 F. & F. 7.

⁷ 12 C. B. 507.

Flower v.
Adam.

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Moffatt v.
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In *Moffatt v. Bateman*,¹ the kingbolt by which the front wheels of a carriage were attached to the hind part broke, through jolting over an uneven road; the Privy Council were there of opinion that this was not evidence of negligence in the circumstances. That being so, the breaking of the shafts of a cart in an unexplained way would not seem any more to be ground for attributing negligence; while the circumstances that the breakage was brought about by a kicking horse would not appear to import any additional element of negligence to what before existed.²

Illidge v.
Goodwin.

It has been held not negligence to remove goods from a cart without putting a person at the head of the horse to prevent his moving.³ In the often-cited case of *Illidge v. Goodwin*⁴ the owner of a horse and cart left standing in a street without any one to watch them was held liable for damage done by them; though the horse was a very quiet one, and the proximate cause was the act of a passer-by in striking him. "If a man," said Tindal, C.J., "chooses to leave a cart standing in the street he must take the risk of any mischief that may be done." This case has not escaped comment. Its justification must stand either on the inaccuracy of the earlier case, or on the special facts proved, shewing that in the circumstances it was a wrongful act to leave the horse and cart unattended; or that, though not at first wrongfully left, they were so left unattended for an unreasonable time. Unless some such features as these are discovered, it seems to fall under the principle that one is not bound to anticipate mischievous or wrongful acts on the part of others, and consequently is not required to guard against them.⁵ To leave a perfectly quiet horse unattended in St. Paul's Churchyard, even while only engaged in removing goods from a cart may well in itself be negligence, as being "to the common danger;" yet it does not follow that to do the same on a country road would be other than a perfectly lawful act. There is no rule of law that a

¹ L. R. 3 P. C. 115, *ante*, 136.

² *Cox v. Burbidge*, 13 C. B. N. S. 430. See also *Abbott v. Freeman*, 35 L. T. N. S. 783, reversing 34 L. T. N. S. 544, where the plaintiff was kicked by a horse while attending a sale of horses.

³ *Hayman v. Hewitt*, Peake's Add. Cas. 170.

⁴ 5 C. & P. 190. *Lynch v. Nurdin* was regarded by Lord Denman, C.J., 1 Q. B. at 36, as an *à fortiori* case after *Illidge v. Goodwin*; see 2 & 3 Vict. c. 47, s. 54 sub-s. 4, 1 & 2 Will. IV. c. 22, s. 55. In *Phillips v. Dewald*, 11 Am. St. R. 458, a duty to stand by a horse in a street and not leave it loose was affirmed. *Lynch v. Nurdin* was approved in *Union Pacific Railway Company v. McDonald*, 152 U.S. (45 Davis) 262, per Harlan, J., at 270.

⁵ *Parker v. City of Cohoes*, 10 Hun. (N. Y.) 531, at 534. "Surely a man in his own yard or field may leave his horse and cart unattended. If he does so, in my judgment he owes no duty to any one, unless he has reason to know at the time he so leaves it, that by so doing he is likely to injure an individual who in fact may be there, or is known as likely to be there, so as to be injured thereby," per Smith, J., *Tolhausen v. Davies*, 57 L. J. Q. B. 392; see *Mann v. Ward*, 8 Times L. R. 699 (C. A.), *Illidge v. Goodwin* was followed in *Melbourne Tramway Company v. Spencer*, 14 Vict. L. R. 95.

horse and cart must be in charge of two persons at least when engaged in loading or unloading. Tindal, C.J.'s, *dictum* is probably correct if limited to the circumstances.

The general rule of law is that where, between the act or neglect of one person and the injury inflicted, the independent act of another person intervenes, and directs the first negligence to the object it ultimately effects, the person whose default has caused the first negligence is not liable. This is illustrated in the Roman law¹ by the passage, *Celsus scribit, si alius mortifero vulnere percusserit, alius postea exanimaverit, priorem quidem non teneri quasi occiderit sed quasi vulneraverit; quia ex alio vulnere perit; posteriorem teneri quia occidit; quod et Marcello videtur et est probabilius*; and in English law, by Erle, C.J., in *The Queen v. Ledger*:² "A mistake, indeed, was said to have arisen from the negligence of the defendant. Still, if the particular negligence imputed to the prisoner appeared not to have been the proximate and efficient cause of the catastrophe, the bill for manslaughter ought not to be found; and if it appeared that other causes had intervened, the prisoner's negligence would not have been the proximate and efficient cause of the deaths which had occurred. That this was in entire accordance with the authorities will appear from the most recent cases. The case is to be clearly distinguished from that of *joint* negligence."³

General rule
fixing liability.

*The Queen v.
Ledger.*

To constitute joint negligence it is not necessary that both the negligent persons should be partakers in the very act causing injury; for as Pollock, C.B., says:⁴ "When two persons are driving together, encouraging each other to drive at a dangerous pace, then, whether the injury is done by the one driving the first or the second carriage, I am of opinion the other shares the guilt." Once more, as explained by Parke, B.,⁵ the injurious act should be "the necessary or ordinary or likely result of that negligence." In *Illidge v. Goodwin* it is to be observed that besides the act of an independent person intervening, there is an independent trespass by an adult, which can scarcely be brought within Parke, B.'s, postulate. If it is conceded that the act of leaving a horse and cart unattended is the negligent act, the dissociation between the first negligence and the act producing the injurious result appears distinct, and the difficulty of reconciling the case with principle insuperable.

Injurious act
to be the
necessary or
ordinary or
likely result
of the negli-
gence.

¹ D. 9, 2, 11, § 3.

² 2 F. & F. 857, note at 858.

³ Cp. *Scott v. Shepherd*, 2 Wm. Bl. 892, 1 Sm. L. C. (9th ed.) 480. The definition of inevitable accident is the same on land as by sea, per Lopes, L.J., *The Schwan* (1892), P. 419, at 434.

⁴ *Reg. v. Swindall*, 2 C. & K. 230, at 233.

⁵ *Bank of Ireland v. Evans's Trustees*, 5 H. L. C. 389, at 410.

The negligence, it may be said, is probably the absence of the master at the time of the wilful blow, and thus may be regarded rather as concurrent than independent. Even in this view there is a difficulty in holding a negligent person responsible for the *wilful* act of a third person, since the law does not presume a breach of law and trespass to be "the necessary, ordinary, or likely result of negligence." In any event the sweeping nature of Tindal, C.J.'s, remark, "If a man chooses to leave a cart standing in the street he must take the risk of any mischief that may be done," must be considerably qualified and restrained.¹

United States cases.

In the United States it has been laid down that a traveller on foot or on horseback must give way, and, if necessary, cross the road, for a vehicle with a heavy load,² and that a lightly loaded vehicle must give way to one heavily loaded.³

Tramcars.

The rule of the road has, as we have seen,⁴ had to be modified in its application to tramcars, which cannot get out of the way, as they move only along the rails laid down for them. In America it has been laid down that carriages meeting them should turn to that side which appears to be the safest, without regard to the usual rule; and the fact that either was on the left of the road at the time of a collision is no evidence of negligence.⁵ Again, when a collision occurs between an ordinary vehicle and a tramcar travelling in the same direction, the presumption is that the driver of the vehicle is negligent.⁶

In *Jardine v. Stonefield Laundry Company*,⁷ Lord President Inglis made some forcible remarks on the alterations in the rule of the road brought about by the conditions in which tramcars are run. He said: "Tramway-cars are no longer a novelty

¹ Cp. *Sullivan v. McWilliams*, 20 Ont. App. 627. In *Henry v. Dennis*, 47 Am. R. 378, where defendant, having left a tub of fish brine by the side of the way, which was wilfully turned over by a third person into the gutter, the plaintiff's cow drank of the spilled brine, and died in consequence, the defendant was held liable to the plaintiff for the loss; but see the cases cited in the note, at 381 of the report, where an opinion adverse to the case is given.

² *Beach v. Parmeter*, 23 Pa. St. 196.

³ *Grier v. Sampson*, 27 Pa. St. 183.

⁴ *Ante*, 652. The 58th clause of the General Tramways Act, 1870 (33 & 34 Vict. c. 78) providing that "the promoters or lessees, as the case may be, shall be answerable for all accident, damages and injuries happening through their act or default or through the act or default of any person in their employment by reason or in consequence of any of their works or carriages" was held in *Brocklehurst v. The Manchester, Bury, Rochdale, and Oldham Steam Tramways Company*, 17 Q. B. D. 118, to apply only to a wrongful act or default, and not to make the promoters or lessees answerable for mere accident caused without negligence, by their use of tramcars.

⁵ *Hegan v. Eighth Avenue Railroad Company*, 15 N. Y. 380. In *Brightly's New York Digest*, under Highways, X. Law of the Road, are collected a number of cases on this subject.

⁶ *Suydam v. Grand Street &c. Railroad Company*, 41 Barb. (N. Y.) 375. As to running tramcars along the highway upon a tramway in a defective condition, see *Sadler v. South Staffordshire and Birmingham District Steam Tramways Company*, 23 Q. B. D. 17, in which case to do so was held an unlawful act, that rendered the company liable for a trespass in respect of a personal injury caused thereby.

⁷ 14 Rettie 839.

among us." "There is one rule of the road which has been very much altered by the appearance of these new vehicles, viz., that one carriage overtaking another is bound to pass it upon the right-hand side. The new rule requires that when a carriage is coming up behind a tramway-car and the car stops, the driver of the other vehicle shall pass upon the left-hand side. That is the opposite of the old rule. The new rule has been introduced from considerations of convenience and safety; and the reason is very obvious, because tramway-cars pass upon two lines of tramways, one in one direction and another in the other. If vehicles were to pass a car on the right-hand side, there would be very great danger of their coming into collision with another car coming the opposite way. That is the reason of the rule. If a person gets off a tramcar on the left-hand side, which is the proper side for the purpose, it is quite obvious that in passing from the tramcar to the pavement he is passing across a carriage-way, and a carriage-way which he ought to know may be travelled over at any moment by vehicles passing alongside of the tram-car. He is just as much bound to look after his own safety in crossing that carriage-way as if he were crossing from one side of the street to the other. It is just as much a carriage-way as the whole street, and while vehicles are bound to go at a steady pace and not to be driven furiously, foot passengers crossing the carriage-way are bound to look after their own safety, and not to run obvious and unnecessary risk."¹ It had previously been laid down by the other Division of the Court of Session² that "the space between the car and the pavement must be looked upon in the same way as an ordinary street crossing. The traffic is not bound to stop at every crossing. The first duty of a member of the public at such a place is to see that the coast is clear, and if it is not, to wait until there is a safe opportunity to cross." The tramways affect the case thus far that it is safer to cross from the middle of a street than from one side to the other, because in the former case there is only one half of the distance to go.

Lastly, as to foot passengers, the law was laid down in the case of *Cotterill v. Starkey*³ by Patteson, J., as follows: "A foot passenger has a right to cross a highway, and it was held in one case⁴ that a foot passenger has a right to walk along the carriage-way. But, without going that length, it is quite clear that a

¹ *Forwood v. The City of Toronto*, 22 Ont. R. 351. *McDermaid v. The Edinburgh Street Tramways Company*, 12 Rettie 15, are cases of tramcars not pulled up in time to avert an accident.

² *Ramsay v. Thomson*, 9 Rettie 140, per the Lord Justice-Clerk (Moncreiff), at 146.

³ 8 C. & P. 691, at 693; *Lloyd v. Ogleby*, 5 C. B. N. S. 667.

⁴ *Boss v. Litton*, 5 C. & P. 407; *Coombs v. Purrington*, 42 Me. 332; *M'Kechie v. Couper*, 14 Rettie 345; *Anderson v. Blackwood*, 13 Rettie 443.

BOOK IV.

DUTY TO ANSWER FOR ONE'S OWN AND OTHERS' ACTS.

CHAPTER I.

DUTY TO ANSWER FOR ONE'S OWN ACTS.

THE consideration of the limitations on the duty to answer for one's own actions raises several points of difficulty. On the one hand, the rule has been formulated that though criminally a man is under no liability in the absence of a *mens rea*, yet civilly he acts at his peril;¹ on the other, it is said that a trespass to the person is only actionable where there is fault² in the person acting.³ There has been much discrepancy in the working out of the principle thus alternatively expressed. We shall probably find that each expresses an aspect of the true view, which is a combination of both.

Two views
of the extent
of liability.

The former of these two statements of principle is most strongly brought out by the facts of some of the earliest cases. In Y. B. 6 E. IV. 7, pl. 18, the doctrine is broadly stated.⁴ Defendant, in cutting his hedge, let cuttings fall on his neighbour's land; the neighbour brought trespass in respect of the wrong. The defendant pleaded that the cuttings fell on plaintiff's land against his will, and that he went quickly on the land and took them, which was the trespass complained of. On this there was a demurrer; and judgment was given for the plaintiff. If, said Littleton, J., your cattle come on my land and eat my grass, notwithstanding you come freshly and drive them out, you ought

First view
illustrated by
case in Y. B.
6 E. IV. 7,
pl. 18.

¹ This is the law of the Digest, D. 9, 2, 45, § 4. *Si defendendi mei causa, lapidem in adversarium misero, sed non eum sed praetereuntem percussero, tenebor lege Aquilia.*

² This was the law in Gaius's time: *itaque impunitus est qui sine culpa et dolo malo casu quodam damnum committit*: Gaius 2, 211.

³ Holmes, the Common Law, 82. Pollock, Torts, (3rd ed.) 124.

⁴ Ames Cases in Tort, 69.

to make amends for what your cattle have done, be it more or less. . . . And, sir, if this should be law that he might enter and take the thorns, for the same reason, if he cut a large tree he might come with his waggons and horses to carry the trees off, which is not reason, for perhaps he has corn or other crops growing, &c. Choke, J., held that—when the principal thing is not lawful, that which depends upon it is not lawful; for when the plaintiff cut the thorns and they fell on the defendant's land the falling was not lawful, and so the coming to take them out was not lawful; "as to what was said about their falling in *ipso invito* that is no plea, but he ought to shew that he could not do it in any other way or that he did all in his power to keep them out."

Comment.

This case, it is true, is concerned with a trespass to realty, while our inquiry is primarily with regard to the duty of a person to another; nevertheless, it cannot be disregarded, and is very important as marking the governing tendency of the law in its dealings with interferences by one person with another's rights; though the law may well impose a more absolute barrier to transgressions against property rights than it regards as necessary in merely personal actions.

Case in Y. B.
21 H. VII. 27,
pl. 5.

Again, in Y. B. 21 H. VII. 27, pl. 5, in an action of trespass, the defendant justified on the ground that the corn for which action was brought was severed from the nine parts as tithe and was in jeopardy of being destroyed, wherefore he took and brought it to the plaintiff's barn. There was a demurrer which was allowed, Rede, J., saying: "The intent cannot be construed, but in felony it shall be. As when a man shoots at the butts and kills a man it is not felony, for there is no intent; and so of a tiler on a house, who with a stone kills a man unwittingly, it is not felony. But when a man shoots at the butts and wounds a man, though it is against his will, he shall be called a trespasser against his intent."

Anonymous
cases in Croke
Elizabeth.

So in an anonymous case in Cro. Eliz.,¹ where a man, having shot at a fowl and thereby set fire to his house, whence the house of his neighbour caught, was held liable; "for the injury is the same, although this mischance was not by a common negligence, but by misadventure; and if he had counted upon the custom of the realm as 2 H. IV., the action had not been well brought: yet *consuetudo regni est communis lex*."²

Weaver v.
Ward.

Reference is invariably made to *Weaver v. Ward*,³ decided in 1616, whenever the question of the extent of liability in trespass

¹ (1582) 1 Cro. (Eliz.) 10.

² See *ante*, 589.

³ Hobart 134. As to the authority of Hobart's Reports, see the preface to Jenkin's Eight Centuries of Reports, 1771.

is raised. Defendant set out in answer to a declaration in trespass that the plaintiff and he were skirmishing in a train-band with their musket, and that in doing so the defendant, *casualiter et per infortunium et contra voluntatem suam*, in discharging his piece, wounded the plaintiff.¹ The plaintiff demurred and obtained judgment, the Court saying: "No man shall be excused of a trespass (for this is in the nature of an excuse, and not of a justification, *prout ei bene licuit*) except it may be judged utterly without his fault. As if a man by force take my hand and strike you, or if here the defendant had said, that the plaintiff ran across his piece when it was discharging, or had set forth the case, with the circumstances, so as it had appeared to the Court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

In 1662 *Gilbert v. Stone*² was decided. Gilbert brought "an action of trespass *quare clausum fregit*, and taking of a gelding." The defendant pleaded that "for fear of his life, and wounding of twelve armed men who threatened to kill him if he did not the fact, [he] went into the house of the plaintiff and took the gelding." Thereon there was a demurrer, and Rolle, J., said: "This is no plea to justify the defendant; for I may not do a trespass to one for fear of threatenings of another; for by this means the party injured shall have no satisfaction, for he cannot have it of the party that threatened."

Then came *Bessey v. Olliot*.³ A gaoler having received a prisoner from the bailiff of a liberty who had taken him outside his jurisdiction, the prisoner brought an action of false imprisonment against the gaoler who had received him under the illegal caption. This was held by the majority of the Court not to lie. Sir T. Raymond dissented, saying: "In all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering." For this proposition he cites the cases already mentioned. Sir Thomas Raymond's statement of the policy of the law, it may be pointed out in passing, is indubitably correct; and yet only goes, as in this case, to the

¹ Mr. Holmes, *The Common Law*, 84, points out that "the words *vi et armis* and *contra pacem*, which might seem to imply intent, are supposed to have been inserted merely to give jurisdiction to the King's Court." As to "viscontiel trespass," i.e., trespass in the sheriff's court, 2 Co. Inst. 211, 212; Reeves, *Hist of Eng. Law* (2nd ed.) vol. ii. 149. As to the allegations *vi et armis* and *contra pacem*, Vin. Abr. Trespass (Q. a. 3), (Q. a. 4), (Q. a. 5). The old cases are all collected Shepp. Abr. Trespass; and see also *ante*, 588.

² Style 72.

³ (1677). This is twice reported; Sir T. Raym. 421, under the name of *Lambert & Olliot v. Bessey*; and at 467 as *Bessey v. Olliot*. In the former report only Sir Thomas Raymond's opinion is given without any intimation that the judgment of the Court was otherwise. The best report is Sir T. Jones 214. Cp. as to protection of an officer of the law: *Tarlton v. Fisher*, 2 Doug. 671.

question of *onus*. Given a state of facts the law will not inquire into the actual intent of those that bring them about; neither will the law refuse to regard other facts which prevent the legal conclusion of intent arising; or, if it has arisen, will so affect the total result as to wipe away what at the first sight appeared conclusive.

Dickenson v.
Watson.

Dickenson v. Watson¹ is the next case, and was decided in 1682. The defendant was a collector of hearth money;² "and for the better discharge of his office, and more sure custody, and keeping of the money by him collected and to be collected, he provided himself with firearms, and having one of his pistols in his hands and intending to discharge it *ne aliquod damnum eveniret*, he discharged it (*nemine in opposito visu existente*), and while he discharged it, the plaintiff *casualiter viam illam præterivit et si aliquod malum ei inde accederet hoc fuit contra voluntatem* of the defendant. *Quæ est eadem transgressio.*" Plaintiff demurred to the sufficiency of this, and the Court sustained the demurrer, "for in trespass the defendant shall not be excused without unavoidable necessity which is not shewn here. Besides, the defendant did not traverse *absque hoc quod aliter seu alio modo* as was done in the case of Weaver v. Ward, Hob. 134. And yet judgment was there given for the plaintiff."

Underwood v.
Hewson.

Then comes Underwood v. Hewson reported as follows:³ "The defendant was uncocking a gun, and the plaintiff standing to see it, it went off and wounded him; and at the trial it was held that the plaintiff might maintain trespass."

Scott v.
Shepherd.

No case in the law is better known than Scott v. Shepherd;⁴ and in this, in 1773, is found the most uncompromising assertion of the extreme liability in personal trespass; where Blackstone, J., says:⁵ "Not even menaces from others are sufficient to justify a trespass against a third person; much less a fear of damages to either his goods or his person, nothing but inevitable necessity." "So in the case put by Brian, J.,⁶ and assented to by Littleton and Cheke, C.J.,⁷ and relied on in Raym. 467. 'If a man assaults me so that I cannot avoid him, and I lift up my staff to defend

¹ Sir T. Jones 205.

² To appreciate the significance of this see Macaulay, Hist. of Eng. vol. i. 225; vol. ii. 426.

³ (1724) 1 Str. 596.

⁴ 2 Wm. Bl. 892, 1 Sm. L. C. (9th ed.) 480.

⁵ L.c. at 896.

⁶ Mr. Holmes, The Common Law 103, says as to this: "The statements of law by counsel in argument may be left on one side, although Brian is quoted and mistaken for one of the judges by Sir William Blackstone in Scott v. Shepherd."

⁷ This is probably a mistake, and we should read here Littleton and Choke, JJ.; Choke, not Cheke, was never Chief Justice. Dugdale, Chronica Series 66, *sub anno*, 1462, and 72, *sub anno* 1485; Dictionary of National Biography, *sub nom* Choke.

myself, and in lifting it up undesignedly hit another who is behind me, an action lies by that person against me; and yet I did a lawful act in endeavouring to defend myself.' " It has been sought to qualify this statement by saying it is the statement of law by a dissentient judge.¹ De Grey, C.J., however, says:² " I agree with my brother Blackstone as to the principles he has laid down, but not in his application of those principles to the present case. The real question certainly does not turn upon the lawfulness or the unlawfulness of the original act; for actions of trespass will lie for legal acts when they become trespasses by accident; as in the case cited of cutting thorns, lopping of a tree, shooting at a mark, defending oneself by a stick which strikes another behind."

Lord Mansfield, too, in *Tarlton v. Fisher*,³ says: "This is a direct action of trespass *quare vi et armis*, and not on the case; and there is this distinction between them which always ought to be attended to: In trespass innocence of intention is no excuse; in case, the whole turns upon it; malice, or the *quo animo* is the very gist of the action."

Lord Mansfield in *Tarlton v. Fisher*.

*Leame v. Bray*⁴ came before the Court on the question of setting aside a nonsuit entered where a collision, occasioned negligently and not wilfully, had been declared on in trespass instead of in case. The Court made the rule of setting the nonsuit aside absolute on the ground that the injury being immediate from an act of force, trespass was the right remedy. In the course of the argument the legal aspect of unintentional acts was much considered. Grose, J., referring to Y. B. 21 H. VII. 27, pl. 5,⁵ which has been already noticed, calls attention to an illustration put there by Rede, J.: "There is a case put in the Y. B. 21 H. VII. 28a, that where one shot an arrow at a mark which glanced from it and struck another, it was holden to be trespass." In giving judgment, Lord Ellenborough, C.J., said:⁶ "It is immaterial whether the injury be wilful or not. As in the case alluded to by my brother Grose, where one shooting at butts for a trial of skill with the bow and arrow, the weapon then in use, in itself a lawful act and no unlawful purpose in view; yet having accidentally wounded a man, it was holden to be a trespass, being an immediate injury from an act of force by another." Grose, J., said:⁷ "Looking into all the cases from the Year-book in the 21 H. VII.

Lord Ellenborough, C.J.'s, view.

¹ Holmes, *The Common Law*, 104.

² 2 Wm. Bl. at 899.

³ (1781) 2 Doug. 671, at 674.

⁴ (1803) 3 East, 593.

⁵ *L.c.* at 596.

⁶ *L.c.* at 599.

⁷ *L.c.* at 600.

down to the latest decision on the subject, I find the principle to be that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass"; and Lawrence, J.,¹ "In actions of trespass the distinction has not turned either on the lawfulness of the act from whence the injury happened, or the design of the party doing it to commit the injury."

Rylands v.
Fletcher.

Again, in *Rylands v. Fletcher*,² Lord Cranworth said: "In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert v. Bessey*, reported by Sir Thomas Raymond.³ And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non lædat alienum*."

Castle v.
Duryee.

With these must be taken the American case of *Castle v. Duryee*.⁴ Militia were being reviewed and were firing, under the orders of the defendant, their colonel, what was supposed to be blank cartridge. The plaintiff, who was looking on in front of the firing line was wounded by a bullet, which could only be accounted for by concluding that one of the men's pieces had been loaded with ball cartridge. Plaintiff sued in "trespass for an assault." A verdict for the plaintiff was affirmed on appeal, as the Court held there was evidence of negligence. Denio, C.J., said:⁵ "The defendant was not required by any public duty to cause his men to discharge their firearms at all, while people were within musket range." "It is not the law, that if one, supposing a musket to be unloaded, or to be charged only with powder, snaps it at another, and he is wounded, he is irresponsible in a civil action; and it is of no consequence, so far as maintaining the action is concerned, that he acted upon the most plausible or the most reasonable grounds, and fully believed that the gun was not charged with anything that could injure another."

The foregoing cases are those usually cited for the former mode of statement. The other view, also, is said to derive countenance

¹ 3 East 593, at 601.

² (1868) L. R. 3 H. L. 330, at 341.

³ Sir T. Raym. 421.

⁴ (1865) 2 Keyes (N. Y.) 169.

⁵ 2 Keyes (N. Y.), at 172.

from a long list of cases. The earliest is in 1481, in Y.B. 21 E. IV. 64, pl. 3. Trespass was brought for taking the plaintiff's cattle. The defendant pleaded that he found the cattle of the defendant in his land damage feasant, and chased them towards the pound, where they escaped from him and went upon other land, where he retook them. This was held a good plea.

Second view
illustrated by
case in Y. B.
21 E. IV. 64,
pl. 3.

In the following year¹ there is a case of trespass against defendant for going on adjoining land to turn the plough while ploughing his own land. The defendant justified by reason of a custom "that they which plough may turn their plough upon the land of another, and that for necessity." This was held good.

Case in Y. B.
22 E. IV. 8,
pl. 24.

In 1624 comes *Mitten v. Faudrye*.² An action for trespass was brought for chasing the plaintiff's sheep. The plea was that they were trespassing on defendant's land, who chased them out with a little dog, and as soon as the sheep were out of the land he called in his dog. To this there was a demurrer. The earlier cases were all referred to, and for the defendant it was argued "a dog is ignorant of the bounds of land." Crewe, C.J., referring to the case in Y.B. 6 E. IV.,³ explained that there trespass lay because the defendant "did not plead that he did his best endeavour to hinder their (the thorns) falling there (on the plaintiff's land); yet this was a hard case. But this case is not like to these cases, for here it was lawful to chase them (the sheep) out of his own land, and he did his best endeavours to recall the dog, and therefore trespass does not lie." Dodderidge, J., said: "Here it appeareth to be an involuntary trespass. A man is driving goods (*sic*) through a town, and one of them goes into another man's house and he follows him; trespass doth not lie for this, because it was involuntary, and a trespass ought to be done voluntarily, and so it is *injuria* and a hurt to another, and so it is *damnum*." The same case is reported in *Latch*⁴ where Dodderidge is represented as saying: "Clearly trespass does not lie here, insomuch as note for a rule that in all trespasses there ought to be a voluntary act and also damage, otherwise trespass does not lie."

Mitten v.
Faudrye.

*Gibbons v. Pepper*⁵ is one of those cases so numerous in the days of strict pleading, where the decision is given on a point of form, yet where incidentally points of substance are treated. The Court there said: "If I ride upon a horse and J. S. whips

Gibbons v.
Pepper.

¹ Y.B. 22 E. IV. 8, pl. 24.

² Poph. 161.

³ *Ante*, 663.

⁴ Twice; at 13 *sub nom.* *Millen v. Hawery*, whence the quotation in the text is taken; and at 119, *sub nom.* *Millen v. Fawdry*.

⁵ (1695) 1 Ld. Raym. 38.

the horse so that he runs away with me and runs over any other person, he who whipped the horse is guilty of the battery, and not me. But if I, by spurring, was the cause of such accident, then I am guilty. In the same manner, if A takes the hand of B, and with it strikes C, A is the trespasser and not B."

Beckwith v.
Shordike.

In 1767, the King's Bench decided *Beckwith v. Shordike* and another.¹ The marginal note is: "Involuntary trespass may be justified, but not a voluntary one." Defendants were going through plaintiff's paddock with a dog, which, escaping from control, killed one of plaintiff's deer. A verdict was given for the plaintiff, on which there was a motion, as the judge was of opinion that the jury ought not to have found the defendant guilty, "it being an accident that happened without their intention and contrary to their inclination." The decision may be summed up in the last sentence of the report: "The present case can't be considered as an accidental involuntary trespass."

Davis v.
Saunders.

Davis v. Saunders,² in 1770, was an action in respect of injuries caused "by the rolling of the sea, and the blowing of the wind," whereby plaintiff's vessel was impelled against defendant's. The rule of law approved was—if in the prosecution of a lawful act an accident purely accidental arise, no action can be supported in respect thereof.

Wakeman v.
Robinson.

Wakeman v. Robinson,³ decided in the Common Pleas in 1823, is the next case requiring notice. As defendant was driving his gig between a coach and a waggon through an interval where there was room for two or three carriages abreast, his horse became frightened by the rattle of another conveyance, swerved and ran the shaft of the gig against one of the waggon-horses, which was so injured that it died in consequence. The defence was that the injury was occasioned by unavoidable accident, without negligence or default of the defendant. In summing up, the judge directed the jury that the action being for trespass, if the injury was occasioned by an immediate act of the defendant, it was immaterial whether that act was wilful or accidental. The jury having found for the plaintiff, defendant moved for a new trial on the ground of misdirection. The proper direction, he contended, was that if the mischief was occasioned by unavoidable accident, without any negligence or default, the defendant was excused. A new trial was refused on the ground that the facts as proved shewed negligence. "If," said Dallas, C.J., "the accident happened entirely without default on the

¹ 4 Barr. 2093.

² 2 Chit. (K. B.) 639. Cp. *Covell v. Laming*, 1 Camp. 497, and note.

³ 1 Bing. 213.

part of the defendant, or blame imputable to him, the action does not lie; but, under all the circumstances that belong to it, I regret that this case comes before the Court.”¹

Hall v. Fearnley² is a decision on the then new pleading rules of 1842. Defendant was driving a cart in the road near the pavement, at the edge of which the plaintiff was walking; plaintiff alleged that defendant drove so close to the pavement as to knock the plaintiff down and run over and break his leg. Defendant endeavoured to shew, under a plea of “Not Guilty,” that the plaintiff slipped from the curb as the cart was passing, and so got his leg under the wheel. Wightman, J., told the jury they were to see whether the injury arose from inevitable accident or by the defendant’s fault. The jury found for the defendant. The Court ordered a new trial, because there was no special plea, and because any defence admitting the trespass complained of to be the act of the defendant must be pleaded specially. Under “Not Guilty,” the alleged act may be shewn to be the result of an accident, or of some agency over which the defendant had no control, so that, substantially, it was not his act; but any defence that admits that the act is a trespass, and was the defendant’s act, although unintentional or accidental, must be specially pleaded, because the defence is in the nature of an excuse for what, *prima facie*, is not justifiable.

Holmes v. Mather³ was the case of horses bolting with a carriage, the groom in charge not being able to control them, so that they drove over plaintiff’s wife. As Cleasby, B., put the matter, “the horses were not driven there by the defendant’s servant, but they went there in spite of him, so far as he directed them at all.” The defendant was held not liable. “If,” said Bramwell, B., “I am being run away with, and I sit quiet and let the horses run wherever they think fit, clearly I am not liable, because it is they, and not I, who guide them; but if I unfortunately do my best to avoid injury to myself and other persons, then it may be said that it is my act of guiding them that brings them to the place where the accident happens. Surely it is impossible.” Here it may be pointed out the injurious agency was in full career independently of the defendant’s act, which was an effort to bring it within bounds that was ineffectual, and not an act in any respect moving mischief.

¹ The negligence proved was that the defendant’s horse was young and spirited; that he had no curb rein: that the defendant pulled the wrong rein, and that he ought to have continued a straight course, allowing the coach to pass between him and the waggon.

² 3 Q. B. 919.

³ (1875) L. R. 10 Ex. 261.

The consideration of *Stanley v. Powell*,¹ the most recent of the English cases, is for the moment deferred until the American law has been noted, and the whole subject is before us.

Law in the
United States.

The law in the United States is thus stated:² For a purely accidental occurrence, causing damage without the fault of the person to whom it is attributable, no action will lie, for though there is damage, the thing amiss—the *injuria*—is wanting.”

Terms unde-
fined.

Two important terms in this statement, on which the significance of it greatly depends, are undefined—what is a purely accidental occurrence and what marks fault. The cases, however, will materially assist us in arriving at their meaning.

Harvey v.
Dunlop.

In *Harvey v. Dunlop*,³ where one child threw a stone at another child which put out her eye, Nelson, C.J., says: “No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part. . . . All the cases concede that an injury arising from inevitable accident, or, which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility.”⁴ Fault, then, exists where an act is done resulting in injury to another which human care and foresight are able to guard against. What is a purely accidental occurrence is illustrated by *Brown v. Kendall*.⁵ The defendant, while trying to separate two dogs which were fighting (one of them being his own), having raised his stick over his shoulder in the act of striking, accidentally hit the plaintiff in the eye; this was the injury sued for. At the trial the judge instructed the jury, “if the defendant, in beating the dogs, was doing a necessary act, or one which it was his duty under the circumstances of the case to do, and was doing it in a proper way; then he was not responsible in this action, provided he was using ordinary care at the time of the blow. If it was not a necessary act; if he was not in duty bound to attempt to part the dogs, but might with propriety interfere or not as he chose; the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word inevitable not in a strict, but a popular sense.” The jury found for the plaintiff. Defendant thereupon moved for a new trial on the ground of misdirection.

Brown v.
Kendall.

¹ (1891) 1 Q. B. 86.

² Cooley, Torts (2nd ed.) 91. There are a large number of cases collected in the note at 92, which need not here be referred to in detail.

³ Hill and Denio, Suppl. Vol. by Lalor, 193.

⁴ See *Vincent v. Stinehour*, 7 Vt. 62.

⁵ (1850) 60 Mass. 292.

Shaw, C.J., delivered judgment, making the rule absolute.¹ Judgment of Shaw, C.J.
 "We think as the result of all the authorities" "that the plaintiff must come prepared with evidence to shew either that the intention was unlawful or that the defendant was in fault; for if the injury was unavoidable and the conduct of the defendant was free from blame he will not be liable.² If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom.³ In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given; to this effect, that if both plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time, both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover. In using this term, ordinary care, it may be proper to state that what constitutes ordinary care will vary with the circumstance of cases. In general, it means that kind and degree of care which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man, who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use less circumspection and care than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed."

In connection with this the case of *Morris v. Platt*⁴ must be noticed, where the same train of thought is pursued. Defendant, while engaged in lawful self-defence, fired a pistol at his assailant, whom he missed, and wounded an innocent bystander;⁵ but was held not liable, because, in the circumstances, guilty of no negligence. "An accident," says Butler, J.,⁶ "is an event or occurrence which happens unexpectedly, from the uncontrollable

¹ 60 Mass. 292, at 295.

² 2 Greenl. Ev. §§ 85-92, *Wakeman v. Robinson*, 1 Bing. 213.

³ *Davis v. Saunders*, 2 Chit. (K.B.) 639; Com. Dig. Battery, A. (Day's ed.) and notes; *Vincent v. Stinehour*, 7 Vt. 69.

⁴ (1864), 32 Conn. 75.

⁵ Cp. D. 9, 2, 45, § 4. *Qui cum aliter tueri se non possunt damni quiddam dederint, innoxii sunt; vim enim vi defendere omnes leges omniaque jura permittunt. Sed si, defendendi mei causa, lapidem in adversarium misero, sed non eum sed prætereuntem percussero, tenebor lege Aquilia; illum enim solum, qui vim infert, ferire conceditur; et hoc, si tuendi dumtaxat, non etiam ulciscendi causa factum sit.*

⁶ 32 Conn., at 85.

operations of nature alone, and without human agency, as when a house is stricken and burned by lightning or blown down by tempest, or an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both; and a classification which will embrace all the cases of any authority may easily be made. In the first class are all those which are *inevitable* or absolutely unavoidable, because effected or influenced by the uncontrollable operations of nature; in the second class those which result from human agency alone, but were *unavoidable under the circumstances*; and in the third class, those which were *avoidable*, because the act was not called for by any duty or necessity, and the injury resulted from the want of that extraordinary care which the law reasonably requires of one doing such a lawful act, or because the accident was the result of actual negligence or folly, and might with reasonable care adapted to the exigency have been avoided. Thus, to illustrate, if A burn his own house and thereby the house of B, he is liable to B for the injury; but if the house of A is burned by lightning, and thereby the house of B is burned, A is not liable; the accident belongs to the first class, and was strictly inevitable or absolutely unavoidable. And if A should kindle a fire in a long disused flue in his own house which has been cracked without his knowledge, and the fire should communicate through the crack and burn his house, and thereby the house of B, the accident would be unavoidable under the circumstances and belong to the second class. But if A when he kindled the fire had reason to suspect that the flue was cracked, and did not examine it, and so was guilty of negligence, or knew that it was cracked and might endanger his house and that of B, and so was guilty of folly, he would be liable although the act of kindling the fire was a lawful one, and he did not expect or intend that the fire should communicate."

The Nitro-glycerine Case.

The line marked by these cases was approved in the Nitro-glycerine Case,¹ by the Supreme Court of the United States. "No one," it is said, "is responsible for injuries resulting from unavoidable accident, whilst engaged in a lawful business." "The measure of care against accident, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own."

Comyns's Digest.

For the understanding of the law it may be well to refer now to Comyns's Digest. In Hammond's edition² in a note³ the

¹ (1872) *Parrot v. Wells*, 15 Wall. (U.S.) 524, at 537, 538.

² 5th (1822).

³ Battery (A) note (d).

statement is made, that where one man has been the occasion of damage to another, in order to constitute such damage a legal injury, it is essential that some degree of blame be imputable to the party producing it; and no one can in any shape be made amenable for consequences which his prudence could not avert. Hence the terms *inevitable necessity*, *unavoidable accident*, and their equivalents, which are constantly to be met with in the books. Nor is this rule open to any abuse; for so anxious is the law to preserve unimpaired the rights of personal safety and of property, that it regards not those acts only which invade them through design, but likewise all others that infringe them through carelessness and neglect, without the concurrence of evil disposition; and characterizes conduct as negligent and careless, if, by any extraordinary degree of circumspection greater than is usually practised in the ordinary affairs of life, the person acting might have guarded against the accident. This general rule, the note continues, is not without its exceptions, one of which is discovered in the case where an officer innocently executes the process of a court having no jurisdiction in the particular matter. With respect to the rule itself, one of the expressions alluded to as an equivalent to inevitable necessity and unavoidable accident is *involuntary* trespass. This is to be interpreted that the defendant must, at the time, have a command over his will and actions, otherwise he is not a trespasser; and when the reverse happens, and the defendant is disabled from exercising control, then, and then only, is he excused from rendering to the plaintiff a compensation for the damage he *involuntarily* occasions. In order to render a trespass excusable, the act itself must be inevitable, and the defendant altogether blameless in producing the circumstances leading to it; for if the defendant wrongfully places himself in a situation whereby he becomes the instrument of mischief to another, he cannot excuse himself by saying that the accident happened without the possibility of his preventing it at the time.

In looking through the cases it may be noted that, in every one of those cited for the stricter statement of the rule, there is room, at any rate, for the admission of the more liberal. Thus there would be liability in either view in the case from the Year-Book, 6 E. IV. A man may not elect to clip his hedge so as to inconvenience his neighbour. Neither, referring to the case in Y. B. 21 H. VII.,¹ is a man constrained to have his property protected without his authorization or assent. One meddling with another's property does so at his peril, or, at least, takes the risk of the

Review of the cases.
I. Those cited in support of the more stringent view.

¹ Ante, 664.

owner resenting and repudiating his intervention. Again, in *Weaver v. Ward*,¹ the demurrer was allowed; because it did not appear from the defendant's plea that the occurrence "had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt." *Gilbert v. Stone*² merely shews that defendant had a choice of two courses, and preferred to save himself at the expense of his neighbour. *Bessey v. Olliot*³ is really an authority the other way, for the *dictum* cited is only that of Sir Thomas Raymond. The decision was that the gaoler was not liable, though he had taken and imprisoned the plaintiff, because he had acted in the discharge of an absolute duty. *Dickenson v. Watson*⁴ is an authority that unavoidable necessity excuses a trespass. *Underwood v. Hewson*⁵ is at least consistent with want of care in performing a dangerous operation. The *dicta* in *Scott v. Shepherd*,⁶ which are the most thoroughgoing of all, yet admit the exception of "inevitable necessity." In *Leame v. Bray*⁷ the limits of liability in trespass were only incidentally treated, the mind of the Court being turned rather to the definition of trespass. Admitting, too, that a plea of general want of intention discloses no good defence to trespass, it does not follow that some species of unintentional acts may not so be set out as to suffice, *e.g.*, acts done of necessity or even under strong moral compulsion, as from motives of self-preservation or the preservation of others from destruction.⁸ In *Rylands v. Fletcher* Lord Cranworth⁹ was contemplating injury done to another in the management of one's own affairs. Compulsive action, or action under disinterested reasons of any kind, does not seem to have been in his mind. Lastly, in the New York case,¹⁰ "public duty" was recognized as an exception to liability; and the utmost that is laid down is that, where there is no call of public duty, so dangerous an act as firing a musket in the presence of a crowd must be done with the greatest precautions. Thus it appears that in not one of the cases cited is the rule that a man acts at his peril borne out in all its unqualified breadth.

II. Those cited
in support of
the laxer view.

On the other hand, the cases which are cited for the laxer rule are not inconsistent with any of those vouched for the more exigent. The first case from the Year-Book¹¹ is explainable by reference to the special law as to animals; the second is at most a special rule

¹ Hobart, 134.

² Style, 72.

³ Sir T. Raymond, 421, 467; Sir T. Jones, 214.

⁴ Sir T. Jones, 205.

⁵ 1 Str. 596.

⁶ 2 Wm. Bl. 892, 1 Sm. L. C. (9th ed.) 480.

⁷ 3 East 593.

⁸ Com. Dig. Battery A. n (d) 9.

⁹ L. R. 3 H. L. 330.

¹⁰ *Castle v. Duryee*, 2 Keyes (N.Y.) 169.

¹¹ Y. B. 21 Ed. IV. 64, pl. 3, *ante*, 669.

in the interests of agriculture, if not a more limited custom still. *Mitten v. Faudrye*¹ is concerned with a rule of public policy as to dogs; so is *Gibbons v. Pepper*² as to horses. *Beckwith v. Shordike*³ recognizes that an involuntary trespass is excused; but is an authority against the view that what, as an immediate act, cannot be helped is therefore excusable as a trespass. In *Davis v. Saunders*⁴ the alleged trespass is excusable because the injury was caused "by the rolling of the waves and the blowing of the wind," in circumstances where plaintiff and defendant were both entitled to be, and one with no greater right than the other. *Wakeman v. Robinson*⁵ again, so far as it can be cited for any general proposition, negatives the view that, where a man has a right to do a particular act, and, in doing it, places himself in such a position that damage ensues to another also in the exercise of a legal right, the former is excused, if the immediate cause of the injury is outside his own control. *Hall v. Fearnley*⁶ notes an antithesis between inevitable accident and defendant's fault. *Holmes v. Mather*⁷ is once more the familiar principle—excusing unaccountable freaks of animals. Then come the important American cases. In *Morris v. Platt*⁸ a reasonable effort at self-preservation was held to excuse the infliction of incidental harm. In *Brown v. Kendall*,⁹ though the defendant may have been under no legal obligation to separate the dogs, there was at least a social obligation, possibly a moral one, to do so. Mr. Holmes, in his comment on this case, says:¹⁰ "The Court held that, although the defendant was bound by no duty to separate the dogs, yet, if he was doing a lawful act, he was not liable, unless he was wanting in the care which men of ordinary prudence would use under the circumstances, and that the burden was on the plaintiff to prove the want of such care."

Brown v. Kendall.

Mr. Holmes's interpretation of the decision.

The passage alluded to in the judgment is as follows: "We are not aware of any circumstances, in this case, requiring a distinction between acts which it was lawful and proper to do, and acts of legal duty. There are cases, undoubtedly, in which officers are bound to act under process, for the legality of which they are not responsible, and perhaps some others in which the distinction would be important. We have no doubt that the act of the defendant, in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and lawful means. If, then, in doing this act, using due

Judgment of the Court.

¹ Poph. 161.

² 4 Burr. 2093.

³ 1 Bing. 213.

⁴ L. R. 10 C. P. Ex. 261.

⁵ 60 Mass. 292.

⁶ 1 Ld. Raym. 38.

⁷ 2 Chit. (K. B.) 239.

⁸ 3 Q. B. 919.

⁹ 32 Conn. 75.

¹⁰ The Common Law, 106.

care and all proper precautions necessary to the exigency of the case to avoid hurting others, in raising his stick for that purpose, he accidentally hit the plaintiff in the eye and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie."

Mr. Holmes's
statement
criticized.

From this it appears that Mr. Holmes has not a little overstated the principle of the decision. The distinction in the mind of the Court was manifestly between compulsory acts, as where officers act under process, and non compulsory; for example, the act in this case. Any distinction in the quality of non-compulsory or lawful acts was rendered unnecessary by the narrow ground taken for the judgment. "The act of the defendant in attempting to part the fighting dogs, *one of which was his own, and for the injurious acts of which he might be responsible*, was a lawful and proper act which he might do by proper and lawful means." Mr. Holmes argues from a particular kind of lawful act carefully specified with two distinct limitations—(1) that the dog was defendant's own; (2) for the injurious acts of which he might be responsible—to the doing of any lawful act,¹ disregarding wholly the carefully inserted limitations.

Tested whether by English law or principle, a generalization that excludes all lawful acts done with adequate care from the category of trespass, does not seem correct. On the other hand the cases we have examined clearly demonstrate that the notion of an absolute liability for damage done to another is misconceived; since even those cases which support the strictest view² exclude things done under "inevitable necessity" from the category of actionable wrongs.

Onus to shew
inevitable
necessity.

In passing it may be noted, that in law the burden lies on the defendant to shew this "inevitable necessity." Injury *prima facie* imports liability. If the defendant wishes to shew his conduct was inevitable, he is put to shew either the cause of the occurrence complained of, and that the result of the cause was inevitable; or that of every possible cause which could have produced the effect, in fact not any one actually did so.³

The cases further point to the conclusion that liability has its root in blame; else "inevitable necessity," or, as appears above, the absence of blame, would not excuse. If, then, blame is at

¹ Denman, J.'s, definition in *Stanley v. Powell* (1891), 1 Q. B. 86, at 93, of a lawful act may be given *quantum valeat*, "lawful, by which I understand justifiable, even if purposely done to the extent of purposely inflicting the injury, as, for instance, in a case of self-defence." With Mr. Holmes a lawful act is one that may be lawfully done, an act in itself allowable; the question of care, &c., is posterior. Denman, J.'s, definition would include an act in itself distinctly unlawful, *e.g.*, the shooting of a man if justifiable in the circumstances.

² *E.g.*, *Scott v. Shepherd*, 2 Wm. Bl. 892, 1 Sm. L. C. (9th ed.) 480.

³ *The Merchant Prince* (1892), P. 179, per Fry, L.J., at 189.

the root of liability, the doer of an *unlawful* act¹ is *à fortiori* liable for the consequences of it.

The converse of this is, however, by no means necessarily true —that the doer of a lawful act is not liable for the consequences of it. In those of the American States which do not accept the law as expounded in *Rylands v. Fletcher*,² the theory of absence of liability for the consequences of a lawful act may require examination; but in England any such theory is in conflict with the law as there laid down, and is thus concluded by authority. For the moment, putting this point aside, let us consider how the theory advanced agrees with principle. In *Brown v. Kendall* the defendant's act was directed to stopping his dog fighting. He was held free from liability, in respect of what happened incidentally and without negligence, in his pursuance of this endeavour, because what he was doing was right and proper in the particular circumstances. His act was justifiable in the result; whether in the abstract and without the particular circumstances may be doubtful. If the dog had not been the defendant's dog, and had not been fighting, yet had been beaten by the defendant on the highway, and the accident had thus happened, the complexion of the whole affair would have been different. Suppose, again, that the dog, being the defendant's dog, was yet at the time of the beating not actually engaged fighting, but only *had been* fighting on some other occasion; or had got lost and been recovered, and was being punished for a transgression past and gone. To beat a dog is, within limits, as lawful an act as to prevent it fighting; and beating a dog does not become other than lawful, in ordinary language at least, because the beating is in a street. If the accident had happened while chastising the dog, would the injured person be precluded from recovery because the act out of which the injury arose was a lawful one? If he could recover, the test of whether beating a dog in the street is a lawful act or not is not the correct test. If he could not, the maxim of law, *Sic uti tuo ut alienum non lædas*, is reversed or limited, with some reference, perhaps, to real rights alone. The quiet citizen must keep out of the way of the exuberantly active one. The duty is to avoid being injured, not to avoid injuring.

Test the matter by pleading. A trespass is only actionable when it results from other than a lawful act; consequently, a

Mr. Holmes's principle that the doer of a lawful act is not liable in trespass examined.

As a point of pleading.

¹ Not in the sense of Denman, J., an act done without justification, but an act, apart from the question of justification, primarily against law.

² L. R. 3 H. L. 330: "The drift of the ancient English authorities on the law of torts seems to differ materially from the view now prevailing in this country," says Doe, J., in a case where apparently the law of the two countries is identical: *Brown v. Collins*, 53 N. H. 442. The judgment herein contains a very full collection of the class of cases now being considered.

declaration setting out the facts would often be insufficient as being consistent with a lawful as well as an unlawful act; for illegality is never to be presumed. *Hall v. Fearnley*¹ shews this view of a trespass is not correct. "The act of the defendant was *prima facie* unjustifiable, and required an excuse to be shewn," are the words of Wightman, J. In *Milman v. Dolwell*,² Lord Ellenborough says: "The defendant allows that he intermeddled with goods which were the property and in the possession of the plaintiff. By so doing he is presumed to be a trespasser." Obviously, because any act interfering with person or property of another is presumptively a trespass.³

Ambiguity in the use of the term "lawful acts."

The difficulty lies in the ambiguity in the use of the term "lawful acts," which, we have already seen, may be made to cover different states of fact. An act, it is plain, may be lawful in itself, or only in the circumstances in which it is possible for it to be performed. Denman, J., taking the latter meaning, declares acts lawful if justifiable. This change of wording, by which "justifiable acts" are substituted for lawful acts, tends rather to darken the matter; since "justifiable" is a wider term than "lawful," and, while not any clearer in its meaning, must be used in a non-natural sense and include "excusable acts," or else must give rise to a confusion which, till the introduction of the new term, we were free from. Besides, it lands us in a maze of particulars. An act is lawful if justifiable; and justifiable, if the circumstances warrant the act being done. If we are driven to this tedious inquiry in every case, there is no help for it; the tediousness and inefficiency of the process, however, raise a strong presumption against its correctness. The other method of proceeding seems greatly preferable. An act interfering with the person or property of another, which is presumptively a trespass, must be either a lawful or a not-lawful act. If the act is not-lawful, the interference is a wrong and therefore actionable. If the act is lawful, in some circumstances it may yet be actionable. To say that an act is actionable when it is not justifiable does not sensibly add to our knowledge. What we have to do is to discriminate lawful acts, which do not enure as trespasses, although they interfere with the person or property of another, from lawful acts which, though done without negligence, become trespasses so soon as they interfere with the person or property of another.

Lawful Acts.
I. Absolute
and obligatory
duties.

At one end of the scale of lawful acts are those that are to be performed as absolute and obligatory duties. The gaoler in

¹ 3 Q. B. 919. Nearly every case, ancient and modern, points to the same conclusion.

² 2 Camp. 378.

³ Cp. *Coward v. Baddeley*, 4 H. & N. 478, originating in a criminal charge. See per Martin, B., at 481.

Bessey *v.* Olliot had to act under his warrant; so that though the imprisonment of Olliot was illegal, the legal obligation imposed upon Bessey protected him from what else had been the consequences.

At the other end of the scale of lawful acts are exertions of right, like a man's right to beat his dog, which possibly should be done subject to the rights of others. If a man chooses, for example, to beat his dog in the street where people may pass, even though he does not see any sign of any one at the time he strikes his dog, it is not unreasonable he should be made to answer for any injury his act may cause to another who happens to come on the scene. The owner may indeed choose where he will beat his dog. If he chooses the public highway he is to that extent blameworthy that he has not chosen a more private place, though his punishment of the dog may be judicious and properly carried out.

II. Exercises of legal right lawful so long as they do not interfere with others.

Between these two extremes there is the large class of cases where, while there is, or may be, no legal duty to act, there is nevertheless, in fact, good reason to act rather than to forbear.¹

III. Things done under inducements to act.

In *Brown v. Kendall* the defendant was very probably under no legal duty to prevent his dog fighting (though if he knew the dog was a fighting dog he was under an actual legal duty); nevertheless the owner of a dog, seeing it fighting in the street, perhaps injuring the property of some one else, certainly creating disturbance and alarm, has a clear social duty to restrain it. If he leaves his dog to fight out its quarrel, himself standing passively by, he may perchance come under no head of legal liability, yet his conduct is distinctly censurable, "as determined by the existing average standards of the community."²

If, then, being placed without fault on his own part in such circumstances that he ought to act in some particular way, the

¹ *Alderson v. Waistell* (1844), 1 C. & K. 358, bears out this distinction, though Sir F. Pollock, *Torts* (3rd ed.), 123, cites it for the proposition: "If the stick which I hold in my hand and am using in a reasonable manner hurts my neighbour by pure accident it is not apparent why I should be liable more than if the stick had been in another man's hand." Sir F. Pollock omits to point out that the basis of the statement on which he relies is that the act done was done reasonably in defence of property. That is, there was a call for action, and not merely a right to act. He adds, *l.c.* note (v): "On this state of facts the jury were directed that in the absence of evidence for what purpose the defendant threw the stick they might conclude it was for a proper purpose, and the striking the plaintiff was a mere accident for which the defendant was not answerable." Taking the statement without the facts with reference to which it was made, it goes very far indeed to suggest a licence to roughs to hurl bludgeons about without other limitation than their sense of humanity or mercy. An answer to Sir F. Pollock's difficulty is, that if a man, with no greater rights than any one else, and with free capacity to act or refrain from acting, chooses to act in circumstances where he may, and does, injure another, fault seems to lie rather with his acting there than with the other person for being there. Is the first comer in a street in the same position as a freeholder on his own land?

² Holmes, *The Common Law*, 125.

law will not punish him for doing what is the only thing consistent with the discharge of his obligations. An analogy is suggested with those cases,¹ where trespassers on railway lines to save life have been held entitled to recover against the railway company on the ground, as put by Lord Macnaghten,² that "to protect those who are not able to protect themselves is a duty which every one owes to society"; or, to put the underlying principle more broadly, as action in such cases is more beneficial for the community than inaction, the law protects reasonably careful action with immunity, or, in the railway cases, with indemnity. In the present case the duty is to act in a particular manner where action is advisable, and is rather incumbent on one person than another.

User of highways is not subject to liability for involuntary acts.

Blackburn, J.'s, statement.

To complete the view we are taking there is a further limitation that must not be passed over. Besides those acts which are prompted by a motive which justifies them, and consequently excuses injury while doing them, without negligence, there is also a class which may be done in ordinary course and irrespective of any injury they may accidentally cause. Blackburn, J., delivering the judgment of the Exchequer Chamber in *Fletcher v. Rylands*,³ points out, in a passage we have already more than once referred to, that: "Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk ;⁴ and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger ; and persons who, by the licence of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care, or skill occasioning the accident ; and it is believed that all the cases in which inevitable accident has been held an excuse for what *prima facie* was a trespass, can be explained on the same principle, viz., that the circumstances were such as to shew that the plaintiff had taken that risk upon himself."

Bramwell, B.'s, statement.

If, in walking along the street, I brush against a person without negligence, I am not liable ; because the liability to such contact is inseparable from any reasonable general user of the

¹ *E.g.*, *Eckert v. Long Island Railroad Company*, 43 N. Y. 502 ; *Pennsylvania Company v. Langendorf*, 29 Am. St. R. 553 ; *ante*, 180.

² *Jenoure v. Delmege* (1891), App. Cas. 73, at 77.

³ L. R. 1 Ex. 265, at 286.

⁴ Inevitable risk is here obviously used in a different sense from what it is in, *e.g.*, *Scott v. Shepherd*, and to quote the phrase used in *Brown v. Kendall*, "not in a strict but a popular sense."

highway ;¹ so, too, if I am splashed with mud by some one in the ordinary course of driving ; as Bramwell, B., says :² “ for the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid.”

The conclusion is that the doing a lawful act is not in itself Conclusion. sufficient to save from liability, unless further it is done in circumstances that free the doing of it from taint of blame. It is not enough that when once the actual doing of the act has been resolved on, the carrying out of the act itself is free from blame. The antecedents must be looked to ; and an act cannot be without blame and involuntary where there is free, unfettered choice to act or refrain independently of any considerations outside the will of the person whose decision determines the action. In regard to personal trespasses no one is entitled to act as to throw upon others the responsibility of avoiding the consequences of his acts. Every one is bound to act so as not injuriously to affect others, without the concurrence of their wills, with the consequences, even though his action is in the abstract lawful.

We may now turn to *Stanley v. Powell*,³ which, in intention at Stanley v. Powell. least, deals directly with the principle under discussion. The judgment proceeds on findings that defendant, who was one of a shooting party, fired at a pheasant and struck it ; the bird began to lower and turn back towards the beaters. The defendant fired again, and a shot glancing from the bough of an oak struck the plaintiff, who was employed as one of the party to carry cartridges and birds. The oak was partly between the defendant and the bird, but was not in a line with the plaintiff. The distance between plaintiff and defendant was about thirty yards. Before summing up, Denman, J., who tried the case, “ called the attention of the parties to the doctrine which seemed to have been laid down in some old cases—that, even in the absence of negligence, an action of trespass might lie.”⁴ The jury found there was no negligence on the part of the defendant. On further considera-

¹ *Cole v. Turner* (1705), 6 Mod. 149, case 210, per Holt, C.J. There is a case in Clayton, 22 pl. 38 (*circa* 1650), on the point, so quaint that I give it in full. “ Kerifford, an attorney, was plaintiff in battery, and the case was thus ; He was walking in the market (as attorneys do too much), and the defendant and he had some angry words there, upon which the defendant did presse to go by him, and in going, by reason of the throng of people there, he justled the plaintiff, and for this he brought this action, in which if an assault onely be proved, it is sufficient, and holden it was no assault, for the touching him or justle was to another end, namely, to get by him in the throng and not to beat him, &c.”

² *Holmes v. Mather*, L. R. 10 Ex. 261, at 267.

³ (1891) 1 Q. B. 86.

⁴ *L. c.*, at 88.

tion judgment was given for the defendant on the ground that the injury was "accidental."

Case criticized. An unexceptionable ground for the decision, that the plaintiff was a member of the shooting party, and as such must be treated as having taken on himself all the risks ordinarily incident to the sport, is referred to in a note as having been urged on behalf of the defendant, yet is not even alluded to in the judgment. Therefore it must be conceded so far as the judgment goes—(1) that the plaintiff was in no different position from any member of the community not connected with the shooting party, and lawfully at the place where he was injured; and (2) that, to quote the words of Erle, C.J.,¹ "the law of England in its care for human life requires consummate caution in the person who deals with dangerous weapons." Now, neither of these considerations seems to have been brought to the attention of the jury. Thus their verdict may not unreasonably have been given on the basis of the plaintiff being a member of the shooting party, and exposing himself to all the risks; against which "no greater than ordinary precautions were necessary."

Morris v. Platt. Reverting for a moment to *Morris v. Platt*,² where it will be remembered the trespass complained of was firing a pistol in self-defence which missed the assailant and injured the plaintiff, the firing which was yet held justifiable, it may be possible from a case so amply vindicating the right of free action to extract a passage bearing on *Denman, J.*'s, views in the present case. We find the law thus stated:³ "If the act of firing the pistol was not lawful, or was an act which the defendant was not required by any necessity or duty to perform, and was attended with possible danger to third persons, which required of him more than ordinary circumspection and care, as if he had been firing at a mark merely, or if the act, though strictly lawful and necessary, was done with wantonness, negligence, or folly, then, although the wounding was unintentional and accidental, it is conceded, and undoubtedly true, that the defendant would be liable."

Suggested
principle
applicable to
Stanley v.
Powell.

Viewing, then, the plaintiff in *Stanley v. Powell* as one of the public, lawfully where he was, the act of the defendant was an act "which the defendant was not required by any necessity or duty to perform," and was, moreover, an act "attended with possible danger to third persons," and "which required of him more than ordinary circumspection and care," and was therefore an act according even to the more liberal tests of the American law one for which the defendant would be liable.⁴

¹ In *Ex. Ch. Potter v. Faulkner*, 1 B. & S. 800, at 805.

² (1864) 32 Conn. 75, at 87.

³ *L. c.*, at 87.

⁴ *Brown v. Collins*, 53 N. H. 442, 16 Am. R. 372; *ante* 17.

It would be a useless labour to follow the judgment through its confused ¹ and inaccurate ² review of the cases. As far as can be surmised, the view presented therein is an amplification of a passage from Bacon's Abridgement: ³ "If the circumstance, which is specially pleaded in an action of trespass, do not make the act complained of lawful, and only make it excusable, it is proper to plead this circumstance in excuse; and it is in this case necessary for the defendant to shew not only that the act complained of was accidental, but likewise that it was not owing to neglect, or want of due caution"; with the gloss that by accidental "I understand that the injury was unintentional."

Now intent is an inference of law, not a matter of direct proof; as is said in *Basely v. Clarkson*:⁴ "For it appears the fact was voluntary, and his intention and knowledge are not traversable; they can't be known." This was said with reference to a plea to an action, *quare clausum fregit*, that the defendant was mowing his land and involuntarily and by mistake mowed down some of the plaintiff's grass; upon which the plaintiff had judgment on demurrer.

If, then, the reasoning of Denman, J., in *Stanley v. Powell*, is Conclusion, correct, it is manifest that the contention of the present chapter is wrong; and that in effect the law of England is that a man must in all circumstances be on the alert to avoid receiving injury and cannot, unless in exceptional cases, throw the risk of acting on him doing the act. That the law of England is not so must be apparent to every student of Blackburn, J.'s, judgment in *Fletcher v. Rylands*.⁵

¹ *Passim*, but particularly at 91.

² Cp. the last sentence about *Leame v. Bray* (3 East 593) on 92 with the extracts from the judgments therein set out, *ante* 667, and particularly with what Lord Ellenborough says at 599 of the report as to the case of accidentally wounding a man with an arrow.

³ Trespass, 706.

⁴ 3 Lev. 37, cited Holmes, *The Common Law*, 99, whose invaluable remarks on the signification of intent in law may here generally be referred to. For the philosophic ground of the rule of law, see a striking note to Hume's *Inquiry Concerning the Principles of Morals*, Section III. of Justice, Part II. Cp. Lord Mansfield, *Tarleton v. Fisher*, 2 Doug. 671, at 674, and *ante* 17.

⁵ L. R. 1 Ex. 265, at 277 *et seqq.*

CHAPTER II.

DUTY TO ANSWER FOR THE ACTS OF OTHERS

PRINCIPLES DETERMINING THE MASTER'S LIABILITY FOR HIS SERVANT.

Definitions of
master and
servant.

Sir Frederick
Pollock's in
his book on
Torts.

Bramwell,
L.J.'s.

BEFORE entering on the inquiry of the manner in which the relation of master and servant affects the master with liability, it is advisable to fix working definitions of the terms master and servant. These are happily to hand in Sir Frederick Pollock's book on Torts.¹ "A master," he tells us, "is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct, the means also, or, as it has been put, 'retains the power of controlling the work';" and he who does work on those terms is in law a servant, for whose acts, neglects, and defaults the master is liable." Again, Bramwell, L.J., in a revenue case,² says: "A servant is a person subject to the command of his master as to the manner in which he shall do his work." A slight change in phraseology makes clear the correlative position of the master.

The same learned judge, when giving evidence before the First Committee of the House of Commons on the Employers' Liability, distinguishing between a contractor and a servant, says: "To my mind, the distinction of the cases where a man is, and where he is not liable for the negligence of another person, may be defined in this way. If there is a contract between them, so that the person doing the work or doing the act complained of, has a right to say to the employer, 'I will agree to do it, but I shall do it after my own fashion; I shall begin the wall at this end, and not at the other'; there the relation of master and servant does not

¹ (3rd ed.) 72. The learned author, at 75, adds that "it is enough to constitute the relation that the servant is bound to obey the master's directions if and when communicated to him." See also Macdonell, *Master and Servant*, 34.

² Crompton, J., *Sadler v. Henlock*, 4 E. & B. 570, at 578.

³ *Yewens v. Noakes*, 6 Q. B. Div. 530, at 532.

⁴ *Minutes of Evidence on Employers' Liability*, Parliamentary Papers, 1876, vol. x. 58.

exist, and the employer is not liable. But if the employer has a right to say to the person employed, 'You shall do it in this way, that is to say, not only shall you do it by virtue of your agreement with me, but you shall do it as I direct you to do it,' there the law of master and servant applies, and the master is responsible."

Once again, the distinction between a servant and an agent is the distinction between serving for and acting for.¹ An agent as contrasted with a servant has a discretion as to the time and manner of performance, and sometimes as to acting or not acting; as contrasted with a contractor, the difference is often that between a general and special agent. The agent so-called has indefinite functions; the contractor's are defined or special. The act of a contractor or of an agent does not affect the employer with liability unless it is done in the necessary conduct of the work, as, for example, in *Percival v. Hughes*.²

The Roman law expresses the liability of the master for the servant thus—*Illud in summa admonendi sumus id, quod jussu patris dominive contractum fuerit quodque in rem ejus versum fuerit, directo quoque posse a patre dominove condici, tanquam si principaliter cum ipso negotium gestum esset. Ei quoque, qui vel exercitoria vel institoria³ actione tenetur directo posse condici placet quia hujus quoque jussu contractum intellegitur.*⁴ The actions *exercitoria* and *institoria* carried in them the germs of the law of agency, which in Roman law was of slow growth and development.⁵ Slaves committing delicts came under the rules of the noxal action.⁶ If a slave committed a delict by his master's orders, the master alone was answerable,⁷ and even where the master could have prevented the wrong the injured person had his choice between a direct and a noxal action.⁸ Otherwise only the slave was liable, and if manumitted might be sued.⁹ If an action were brought against the master he could escape liability by surrendering the slave; if he did not surrender the slave he was liable.¹⁰ If the slave

¹ Cp. Austin, Jurisprudence (3rd ed.), 976, 977.

² 8 App. Cas. 443.

³ For these actions, see D. 14, 1, and D. 14, 3. Hunter, Roman Law 437-443.

⁴ Inst. 4, 7, 8.

⁵ From Gaius 4, 71, the conclusion is drawn that these actions were originally against the son or the slave, but were afterwards extended to *extraneum quemcumque*. The reason of this is given, D. 14, 1, 1; *cum interdum ignari, cujus sint conditionis, vel quales, cum magistris propter navigandi necessitatem contrahamus, æquum fuit, eum qui magistrum navi imposuit, teneri: ut tenetur, qui institorem tabernæ vel negotio præposuit; cum sit major necessitas contrahendi cum magistro, quam institore. Quippe res patitur, ut de conditione quis institoris dispiciat, et sic contrahat; in navis magistro non ita, nam interdum locus, tempus non patitur plenius deliberandi consilium.*

⁶ Inst. 4, 8; Holmes, The Common Law, 8-12.

⁷ *Nam servum nihil deliquisse qui domino jubenti obtemperavit.* D. 9, 4, 2, § 1.

⁸ D. 9, 4, 2-5.

⁹ D. 9, 4, 6.

¹⁰ D. 9, 3, 1.

died before judgment, the master's liability was extinguished ;¹ *a fortiori*, for the tort of a freeman the master was not liable.

Maxim,
*Respondeat
superior.*

Jessel, M.R.,
on the exten-
sion of the
doctrine.

The liability of the master in the English law for the tortious act of his servants, done either without authority or in defiance of it, is much more extensive and is referred to the maxim, *Respondeat superior*.² This maxim, in its original use, applied only "to those who, having the custody of gaols of freehold or inheritance, commit the same to another that is not sufficient," and was found in the concluding section of Statute of Westminster 2 [13 Edw. I.] c. 11: *Et si custos gaolæ non habeat per quod justicietur, vel unde solvat, respondeat superior suus qui custodiam hujus modi gaolæ sibi commisit per idem breve*. From this limited beginning its scope has become so almost universal in modern law that Jessel, M.R., thus comments on it:³ "It is clear that on principle a man is liable for another's tortious act if he expressly directs him to do it, or if he employs that other person as his agent, and the act complained of is within the scope of the agent's authority. I agree that the Court ought to be very careful how it extends the doctrine, *Respondeat superior*. It has been carried in our law very far indeed. I think quite far enough. If I had to enact a law upon the subject, I doubt whether I should carry it so far."

The maxim, *Respondeat superior*, is, in truth, rather the formula whereby liability is referred to its source than the reason for the existence of a liability.

Maxim, *Qui
facit per alium
facit per se.*

The equally familiar maxim, *Qui facit per alium facit per se*,⁴ has been by some sought to be applied in a narrower sense than *Respondeat superior*; and its meaning is taken to be that he who authorizes an act to be done, which is done under his authority, is as liable as he who, personally and for his own benefit, does the same. This undoubtedly is so; though there is no good reason why its meaning should be limited to those cases where authority has actually been given.

Report of
House of
Commons
Committee.

The First Committee on the Employers' Liability in their Report⁵ say that, the maxim is "inapplicable to cases where the act causing the injury is done either without authority or in defiance of it." There is a fallacy in this mode of expressing

¹ D. 9, 4, 39, § 4. The legal position of a slave is fully treated by Dr. Moyle, art. *Servus*, Smith, Dictionary of Greek and Roman Antiquities (3rd ed.).

² 2 Co. Inst. 379. For the American view see Shearman and Redfield, Negligence (4th ed.), § 143. See also Paley, Agency, part iii. sec. 1; Livermore, Principal and Agent, vol. ii. ch. 10, sec. 2; Pothier des Obligations, Nos. 453-456; Domat, bk. i. tit. 16, sec. 3, No. 1.

³ Smith v. Keal, 9 Q. B. Div. 340, at 351.

⁴ The maxim, as it appears in Co. Lit. 258 a, runs, *Qui per alium facit per se ipsum facere videtur*.

⁵ Report of the House of Commons Committee on Employers' Liability, 1877. (Parl. Papers 1877, vol. x. iii.)

cases of liability. The master is never liable where the servant acts without authority—that is, without authority express or implied. The whole ground of the master's liability, in the extreme cases alluded to, is that the master has given, or appeared to give, such an authority to the servant that the master cannot be permitted to deny the validity of such acts, subsequently done by the servant, in following out the objects which have been committed to him, as seem naturally to flow from the position the servant holds while doing them. In those cases where the maxim does not in fact apply, though a legal obligation is imposed notwithstanding on the master, the explanation is that the law estops the master from averring that the act is not his, because he has placed the servant in a position from which a power to do similar acts would ordinarily, or naturally, or probably, be supposed to flow.

The maxim, *Qui facit per alium facit per se*, then, is the statement of a rule of law, the scope of which is not limited by express authorization, and extends to cases where authority to act is implied only, and establishes an irrebuttable presumption in the circumstances in which it becomes applicable.¹

Mutual
relations of
those maxima.

The maxim, *Respondeat superior*, is the legal expression of the consequence arising from the application of the rule of law just stated, where, by reason of the principal's direct authorization of the acts in question, or by a conclusion of law which imputes them to the principal whether he authorized them or not, the principal is precluded from shewing that he personally is not accountable for certain acts. He who does a thing by his agent, express or implied, does it himself; therefore the superior must answer for all acts done by the other for him, whether he has actually authorized them, or left the matter open, or even forbidden them.

The principle at the bottom of this very extensive liability is an irrebuttable presumption²—that the master authorized every act done in advancement of the master's business, pending the authority, and covered by its objects. An authorization for what, very possibly, has been absolutely forbidden is implied by law from the mere existence of the relation of employer and employed,

Fundamental
principle.

¹ "Every act which is done by a servant in the course of his duty is regarded as done by his master's orders, and consequently is the same as if it were the master's own act, according to the maxim, *Qui facit per alium facit per se*": per the Lord Chancellor (Chelmsford), *Bartonshill Coal Company v. McGuire*, 3 Macq. (H. L. Sc.) 300, at 306.

² Per Kelly, C.B., giving judgment in the Exchequer Chamber in *Bayley v. Manchester, Sheffield, and Lincolnshire Railway Company*, L. R. 8 C. P. 148, at 152: "The principle to be deduced from the authorities on this subject is, that where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable, even though the act done may be the very reverse of that which the servant was actually directed to do."

Grounds for
the establish-
ment of the
principle.

and on two grounds: First, that the real principal should be affected with responsibility for his acts; secondly, that he should not be able, by secret agreement or special terms, to avoid the detriment, while assuming the benefit, of acts appropriate to, or consequential on, the existence of the relation of master and servant.¹ Admitted authority to do an act, the hand that actually does it may be the servant's, yet the reason of the act is the master's authorization or the master's interest; therefore the master, as the motive power, is responsible.²

The law goes even further than this; and where there is authority to do an act the master's authorization covers all acts, whether implicated in, or subsidiary to, the main action, and not those merely which are necessary to the effectual doing of it. Therefore the question of what is implicated in, or subsidiary to, any particular relation must be settled previously to affirming liability, or non-liability, in respect to any act. Through all the relation the principle runs, that if the act is not the master's act expressly authorized, it is yet an act done with circumstances that the law requires should raise the presumption of the master's authority.

Willes, J., in
Barwick v.
English Joint
Stock Bank.

The statement of this principle of law by Willes, J., giving the judgment of the Exchequer Chamber in *Barwick v. English Joint Stock Bank*,³ has been often approved. He says: "The general rule is, that the master is answerable for every such

¹ *Limpus v. London General Omnibus Company*, 1 H. & C. 526. "The law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability:" per Willes, J., at 539. Objections have been made to the justice of imposing on the master, the possibly ruinous consequences of his servant's negligence. The answer is, That the master, for his own purposes, has armed his servant with the destructive agency. The misuse of it should enure to the master's detriment rather than those injured by it should suffer loss. In reply it is urged that in criminal procedure, the master is not liable at all. The criminal law has no regard to the loss of the individual, but exclusively looks to the good regulation of the State. The test of damages can never be what would be an adequate pecuniary penalty for the offence, since penalty and damages are for different objects, and have no point of relation. The penalty is a payment for breach of the law: damages for infringement of a personal right.

² Opinions will vary as to whether greater abuse arises from leaving the master liable in all events, or from relieving him from liability, save where he is shewn to be in fault. In the one case he will undoubtedly be liable where he ought not to be; in the other he will be able, by collusion, to escape liability, with which equally undoubtedly he should be affected. The balance of advantage or disadvantage will probably be determined more by the tendency of mental habit in each inquirer, than from an undisputed count of gains and losses. See a pamphlet, *The Evils of the Unlimited Liability for Accidents of Masters and Railway Companies*, by Joseph Brown, Q.C., F.G.S. (Butterworth, 1870). The pamphlet is written from the jurisprudential, not from the legal, standpoint.

³ L. R. 2 Ex. 259, at 265-6. "The true rule was, it seems to me, enunciated by the Exchequer Chamber in a judgment of Willes, J., delivered in the case of *Barwick v. English Joint Stock Bank* This definition of liability has been constantly referred to in subsequent cases as adequate and satisfactory, and was cited with approval by Lord Selborne, in the H. of L., in *Houldsworth v. City of Glasgow Bank* (5 App. Cas. 317). *Mackay v. Commercial Bank of New Brunswick* (L. R. 5 P. C. 394) is consistent with this principle. It is a definition strictly in accordance with the

wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.¹ That principle is acted upon every day in running-down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad improperly selling the cargo.² It has been held applicable to actions of false imprisonment in cases where officers of railway companies intrusted with the execution of bye-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the bye-laws.³ It has been acted upon where persons employed by the owners of boats to navigate them and to take fares have committed an infringement of a ferry or such-like wrong.⁴ In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

Lord Herschell, too, very tersely expresses the same in *Baumwoll Manufactur von Carl Scheibler v. Furness*⁵ thus: "It cannot be disputed as a general proposition of law, that a person who does not himself enter into a contract, can only be made liable upon the contract if it was entered into by one who was his agent or servant acting within the scope of his authority; and it is equally indisputable that a liability by reason of a wrong or a tort can only be established by proving, either that the person charged himself committed the wrong, or that it was committed by his servants or his agents acting within the scope of their authority."

Lord Herschell
in *Baumwoll
Manufactur
von Carl
Scheibler v.
Furness*.

We are now to consider some features of the growth of this principle of the master's vicarious responsibility. There is no reason to doubt that the recognition of a liability of the master for the torts of the servant is pretty well coeval with the recog-

History of the
law.

ruling of Martin, B., in *Limpus v. London General Omnibus Company* (1 H. & C. 526), which was upheld in the Exchequer Chamber (see per Blackburn, J.)": per Bowen, L.J., *British Mutual Banking Company v. Charnwood Forest Railway Company*, 18 Q.B. Div. 714, at 717.

¹ See *Laugher v. Pointer*, 5 B. & C. 547, at 554.

² *Ewbank v. Nutting*, 7 C. B. 797.

³ *Goff v. Great Northern Railway Company*, 3 E. & E. 672, explaining, at 683, *Roe v. Birkenhead Railway Company*, 7 Ex. 36; and see *Barry v. Midland Railway Company*, 1r. Rep. 1 C. L. 130.

⁴ *Huzzey v. Field*, 2 C. M. & R. 432, at 440.

⁵ (1893) App. Cas. 8, at 16.

nition of the master's liability in contract. In the Y. B. 2 H. IV. 18, pl. 6, the principle is acted upon.¹

Three propositions from the Year Books.

Again in the Year Book of 9 Henry VI. 53, B. three propositions illustrative of the law are to be found; they are to the following effect:

1. If a servant, whose duty it is to sell merchandise, sells an unsound horse² or other merchandise³ in a fair no action lies against the master for deceit, since he did not direct the servant to sell to any person in particular.

2. But if the servant, by direction and contrivance of the master, sells to any particular man, if it prove unsound an action lies against the master, for it is his sale.

3. If the servant of a tavern-keeper sells wine to another which is corrupt, action lies against the master, although he did not tell the servant to sell to the particular man.⁴

First proposition discussed.

The first proposition is probably not law at the present day.⁵ The ground of it is that in case of a sale, where there is opportunity of inspecting the goods, not implying a warranty,⁶ the

¹ Mr. J. Brown, Q.C., Minutes of Evidence taken before the Select Committee on Employers' Liability, Parliamentary Papers, 1876, vol. ix. 38, speaking on the liability of a master for the tort of his servant, says: "I found there was no case whatever prior to the one by Lord Holt in the reign of William III., when the master was held responsible for the negligent acts that his servant committed in the course of his employment. Lord Holt appears to have been the first who laid down this law. He was a great judge, no doubt; but before that time there is reason to believe the law was the other way." The case referred to is manifestly *Turberville v. Stampe*, 1 *Ld. Raym.* 264. The first decision I can find in Scotland of the master's liability for the acts of the servant while he is absent is *Keith v. Keir*, so late as 1812. Decisions of the Court of Session, 183. See also *Baird v. Hamilton*, 4 *Shaw* 790. Mr. Brown's researches do not appear to have been very exhaustive. In *Ashe's Promptuarie, ou Repertory Generall de les Annales, et plusors auters livres del common ley Dengleterre* (1614), under the title *Servant*, the proposition, that *le master serra charge, et respondra, pur lact, l'offence ou tort fait per son servant*, is laid down as clear law, and is supported by references to no less than seven cases. In *Sheppard's Abridgement* (1675), under the title *Master and Servant*, repeated instances of the principle are found, e.g., "If the servant keep his master's fire so negligently that his master's house and the neighbour's house are burnt thereby, the master will be chargeable to the neighbours for this negligence of his servants. But if the negligence were abroad out of his master's house, and such an affect of it, *contra*." The authorities cited for this are *Doctor and Student* (18th ed.), 236; Y. B. 2 H. IV. 18, pl. 6, *Home est tenu de render del fait son servant ou de son hosteller en tiel case, car si mon servant ou mon hosteller mette un chandel en un pariet, et le chandel eschiet en le straw, et arce tout ma meason et le meason de mon vicine auxi, en cest case jeo respondra al mon vicine del damage que il ad. quod concedebatur per curiam*. *Fitzherbert, De Natura Brevium* 94; Y. B. 22 H. VI. 24. This last reference I have not been able to verify. See *Rastell's Entrees, Trespass, Justification per Agistment*; *Parkes v. Mosse* (1590), 1 *Cro. (Eliz.)* 181.

² *Helyear v. Hawke*, 5 *Esp. (N. P.)* 72; *Alexander v. Gibson*, 2 *Camp.* 555; *Coleman v. Riches*, 16 *C. B.* 104, at 113.

³ *Smith v. M'Guire*, 3 *H. & N.* 554, per *Pollock, C.B.*, at 563. "If a man sends his servant to market to sell goods or a horse for a certain price, and the servant sells them for less, the master is bound by it."

⁴ A ground for this is stated by *Martin, J.*, *Le garrr n'ē a purpos: car il est ordeā, q̄ nul vend corrupt vitail*. The case is translated as a note to *Burnby v. Bollett*, 16 *M. & W.* 644, at 647; see also 648, where the statute referred to is identified.

⁵ See the cases cited above.

⁶ *Burnby v. Bollett*, 16 *M. & W.* 644; *Emmerton v. Matthews*, 7 *H. & N.* 586; *Smith v. Baker*, 40 *L. T.* 261. See *ante*, 60.

purchaser is put upon inquiry whether the servant has a special authority given him. The proposition—that the master, having intrusted the servant to sell, he is intrusted to do all that he can to effectuate the sale, and if he exceeds his authority he yet binds his master¹—seems, however, to have prevailed.

The second proposition is undoubted law;² and so is the third. The liability, apart from the special ground of statutory enactment, may be looked at as dependent on the consideration that the master sent the servant there for the purpose of selling wine. The action is for breach of a warranty; and no distinction seems to be drawn between the direct act of the master and the negligence of the servant. The master authorizes the servant to sell wine, and places him in a position where the master's credit is pledged for its good quality.³ The case, too, of a tavern-keeper differs from that stated in the first proposition by reason of there being no opportunity in the first instance for the guest to select the food.

Second and third propositions.

In the time of Charles I. the law is thus laid down: If a servant keep his master's fire negligently, an action lies against the master; otherwise, if he carry it negligently in the street. If I command my servant to distrain, and he ride on the horse taken for the distress, he shall be punished, not I.⁴

Law in the time of Charles I.

An action, *Michael v. Alestree*,⁵ was brought against both master and servant for that "the defendants in Lincoln's Inn Fields, a place where people are always going to and fro about their business, brought a coach with two ungovernable horses, and *eux improvide incaute et absque debita consideratione ineptitudinis loci*, there drove them to make them tractable and fit them for a coach; and the horses, because of their ferocity, being not to be managed, ran upon the plaintiff and hurt and grievously

Michael v. Alestree.

¹ See per Lord Ellenborough, C.J., *Helyear v. Hawke*, 5 Esp. (N. P.) 72.

² *M'Gowan v. Dyer*, L. R. 8 Q. B. 141; *Ormrod v. Huth*, 14 M. & W. 651, at 664.

³ In *Southerne v. Howe*, 2 Cro. (Jac.) 468, referring to *Roswel v. Vaughan*, 2 Cro. (Jac.) 196, it is said that if a man sells wine knowing it to be corrupt, an action of deceit lies against him, although there be no warranty. This is on the authority of *Y. B. 11 E. IV. 6*, pl. 10. See *ante*, 692.

⁴ *Noy Maxims*, ch. 44, 95.

⁵ (1677) 2 Lev. 172, reported also *sub nom.* *Mitchell v. Alestree*, 1 Ventris 295, and *sub nom.* *Mitchell v. Allestry*, 3 Keb. 650. In *Roe v. Latouche*, 9 Ir. C. L. R. 9, at 12, the case of *Michael v. Alestree* is said to be sustainable after verdict on the ground that the allegation in the declaration that the defendant acted *Improvide incaute et absque debita consideratione ineptitudinis loci*, was tantamount to an allegation of negligence. Jessel, M.R., must have been under a misapprehension that hitherto the law had not allowed joinder of master and servant in one writ, when he said in *Eaglesfield v. Londonderry* (Marquis of), 4 Ch. Div. 693, at 708 (affd. 38 L. T. 803, 26 W. R. 540): "A coachman, who by his negligence in driving his master's carriage runs over a child, is liable to an action at the suit of the child, and the master is also liable. I apprehend that under the new practice they might be joined as defendants." See *Whitmore v. Waterhouse*, 4 C. & P. 383. Partial compensation having been recovered against the servant the master is released: *Wright v. London General Omnibus Company*, 46 L. J. Q. B. 429. Cp. *Midland Railway Company v. Martin* (1893), 2 Q. B. 172.

Court. There it is laid down : " If my servant throws dirt into the highway, I am indictable. So in this case if the defendant's servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire ; for it shall be intended that the servant had authority from his master, it being for his master's benefit."

Jones v. Hart. An anonymous case, cited in Lord Raymond's reports,¹ appears to be the same as a case reported in Holt, under the name *Jones v. Hart*,² and decided shortly subsequently to *Turberville v. Stampe*. " A servant to a pawnbroker took in goods, and the party came and tendered the money to the servant, who said he had lost the goods ; upon this, action in trover was brought against the master ; and the question was, whether it would lie or not ? Holt, C.J. : " The action well lies in this case ; if the servant of A with his cart ran against another cart, wherein is a pipe of wine, and overturn the cart and spill the wine, an action lieth against A. So where a carter's servant runs his cart over a boy, action lies against the master for the damage done by this negligence. And so it is if a smith's man pricks a horse in shoeing, the master is liable. For whoever employs another is answerable for him, and undertakes for his care to all that make use of him. The act of a servant is the act of his master, where he acts by authority of his master."

Inference
deducible
from this
case.

The report of this case seems rather to point to the conclusion that the remark of Pollock, C.B., made in another connection,³ might be applied here also, " The law must have been the same long before it was enunciated in this Court," even supposing so definite and categorical a statement to have been a first formulating of the law on the point, than to warrant the inference drawn by an authority⁴ that the law was at one time the other way, and that it was at this period that the transition occurred to the modern view. On the previous page to that on which this

the generality of the pleading, which, however, was held good on the ground that the servant's act was in law the master's. See *Huzzey v. Field*, 2 C. M. & R. 432, at 440. " The servant was acting at the time in the course of his master's service, and for his master's benefit, and his act was that of the defendant, although no express command or privity of his master was proved." " It is part of the history of the law that the judgment in *Huzzey v. Field*, although delivered by Lord Abinger, was prepared by Lord Wensleydale": per Willes, J., *Limpus v. London General Omnibus Company*, 1 H. & C. 526, at 540.

¹ 1 Ld. Raym. 739 ; 2 Salkeld 441.

² Cases temp. Holt 642. This is the second of two cases given by Mr. J. Brown to the House of Commons Committee (see *ante*, 692), to " show when the law was altered." *Kingston v. Booth* is the other.

³ *Vose v. Lancashire and Yorkshire Railway*, 2 H. & N. 728. The remark was there made with reference to the law as laid down in *Priestley v. Fowler*, 3 M. & W. 1.

⁴ Mr. J. Brown, Q.C., in his evidence before the House of Commons Committee on Employers' Liability, *ante*, 692.

case is reported in Salkeld's Reports, is another case,¹ where Holt, C.J., says: "The owners are liable in respect of the freight, and as employing the master; for whoever employs another is answerable for him, and undertakes for his care to all that make use of him." Boson v. Sandford.

About the same time, Holt, C.J., stated the proposition, viewed from its other aspect, "that no master is chargeable with the acts of his servant, but when he acts in the execution of the authority given by his master, and then the act of the servant is the act of the master."² This *dictum* was not necessary for the decision of the case, which was decided on the point that a stage coachman is not within the custom as a common carrier to receive parcels for conveyance, and so to bind his master, unless a regular charge was made for conveyance;³ notwithstanding this, it has been accepted as a weighty authority. Lord Kenyon, in particular, after quoting it, adds the comment: "Now, when a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and, according to the doctrine of Lord Holt, his master will not be answerable for such act."⁴ Later cases are only a reaffirmation of this principle. Middleton v. Fowler.

In the earlier cases much stress was laid on the distinction between the form of action being in trespass or trespass on the case as affording a means of discriminating between those acts of the servant for which the master is answerable and those in respect of which he goes free. Distinction between trespass and trespass on the case.

By the operation of the Judicature Acts, and the Rules of the Supreme Court made in pursuance thereof, these distinctions of form are made nugatory.⁵ Nevertheless, the distinction between a negligent act of the servant and a wilful act, though not in itself conclusive, still indicates a difference of legal obligation on the master. In the one case he answers for his servant's act, in the other he does not necessarily and at all events do so.⁶

¹ Boson v. Sandford, 2 Salk. 440. Cp. Mitchell v. Tarbutt, 5 T. R. 649, and Bullen and Leake Prec. of Plead. (3rd ed.) 708. For remarks on Boson v. Sandford, see Govett v. Radnidge, 3 East 62; Powell v. Layton, 2 B. & P. (N. R.) 365; and per Lord Blackburn, Kendall v. Hamilton, 5 App. Cas. 504, at 543.

² Referring to Upshare v. Aidee, 1 Com. Rep. 25.

³ Middleton v. Fowler, 1 Salk. 282. See Butler v. Basing, 2 C. & P. 613. "It is equally clear, that if persons be foolish enough to send parcels by the waggoner, for a hire paid to him, which is never intended to find its way into the pocket of the owner of the waggon, then the owner is not liable in case the parcel is lost."

⁴ M'Manus v. Crickett, 1 East 106, at 108. This case is discussed in Howe v. Newmarch, 94 Mass. 49.

⁵ 36 & 37 Vict. c. 66, s. 24.

⁶ Morley v. Gaisford, 2 H. Bl. 441, note (a); Ogle v. Barnes, 8 T. R. 188; Bullen and Leake Prec. of Plead. (3rd ed.) See the note (a) to Com. Dig. (Hammond's edition) Action (M 2), where the distinction between trespass and case is fully investigated.

Croft v.
Alison.

Distinction
between acts
of the servant
importing and
not importing
liability.

The distinction was canvassed in *Croft v. Alison*.¹ An accident happened from defendant's coachman striking plaintiff's horses with his whip, in consequence of which they moved forward, and the chariot was overturned. After a verdict for the plaintiff, a new trial was moved for, because the plaintiff was not the owner of the carriage, and because the injury arose from the act of defendant's coachman in wantonly whipping the plaintiff's horses. A rule was refused on both points. As to the latter, the Court said: "The distinction is this: if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment."

Lyons v.
Martin.

Gordon v.
Rolt.

The opinion of two other judges on the same point must not be passed over. Patteson, J., in *Lyons v. Martin*,² says: "A master is liable where his servant causes injury by doing a lawful act negligently, but not where he wilfully does an illegal one"; and Parke, B., in *Gordon v. Rolt*,³ says: "The result of the authorities is, that if a servant in the course of his master's employ, drives over any person, and does a wilful injury, the servant, and not the master, is liable in trespass; if the servant by his negligent driving causes an injury, the master is liable in case; if the master himself is driving, he is either liable in case for his negligence, or in trespass, because the act was wilful."

Williams v.
Jones.

A very curious case illustrating the application of the rule of law is *Williams v. Jones*.⁴ Plaintiff having sold some boards to the

¹ (1821) 4 B. & Ald. 590, at 592; *Seymour v. Greenwood* (1861), 7 H. & N. 355. A master is liable for injury caused by the wanton and violent conduct of his servant in the performance of an act within the scope of his employment. With this case should be compared *Eastern Counties Railway Company v. Broom*, 6 Ex. 314, an inspector of the railway company professing to act as their servant, took the plaintiff out of a railway carriage and gave him into custody on charges of not producing his ticket, not paying his fare, and of annoying the company by being intoxicated. The charge of intoxication was not preferred before the magistrate, one of assault being substituted. In an action for the assault brought against the company the Court held there was no evidence of ratification, and that there was not sufficient evidence to go to the jury in the absence of such evidence of ratification. In *Bank of New South Wales v. Owston*, 4 App. Cas. 270, it is said that the decision is "scarcely consistent with later authorities."

² (1838) 8 A. & E. 512, at 515.

³ (1849) 4 Ex. 365, at 366.

⁴ (1865) 3 H. & C. 256, in Ex. Ch. 602. There is a very similar American decision. A fire was lighted by men in the employment of a railway company, on a right of way belonging to the company, for the purpose of warming their coffee. The plaintiff's property was in consequence set on fire. It was held "no more within the scope of their employment than would be the act of one of these men in lighting his pipe after eating his dinner and carelessly throwing the burning match into the grass": *Morie v. St. Paul, &c., Railroad Company*, 47 Am. R. 793.

defendant, allowed him the use of a shed where he might have them made into a signboard. Defendant employed a carpenter, and, whilst he was at work, a stranger came into the shed, filled his pipe with tobacco, supplied the carpenter with some, and lighted a match. The carpenter, having lighted a shaving, let it fall negligently, and caused a fire that burned down the shed. The jury found that the relation of master and servant existed between defendant and his carpenter, nevertheless the Court of Exchequer entered a nonsuit; as, "after much consideration, we think it impossible to hold that a person who employs another for a sum of money to do certain work is responsible, because the person so employed lights his pipe—a very common and natural act, and which the jury have found to be negligence." In the Exchequer Chamber there was a division of opinion. The judgment of the majority¹ was delivered by Keating, J.:² "That a master is liable for the negligence of his servant in the course of his employment admits of no doubt; and, if it could be said that the act of lighting a pipe of tobacco for the purpose of smoking it was in any way connected with the making of the signboard, which alone Davis [the carpenter] was employed by the defendant to do, there would be no difficulty in saying the master would be liable; but we can see no such connection. It was not necessary that he should smoke in order to make the signboard, nor was the act of lighting the pipe in any way whatever for the benefit of his master, or in the furtherance of the object of his employment." It is said he was negligent whilst using the shed, and that, in a sense, is true. It seems to us, however, that, in order to make the master liable, the servant must not only have been negligent in using the shed, but in using it for the purposes of his master, and in the course of his employment."

Judgment in
the Court of
Exchequer.

Judgment of
the Exchequer
Chamber de-
livered by
Keating, J.

Blackburn and Mellor, JJ., dissented. Blackburn, J., considered the point as, "not one admitting of being elucidated by argument or by decided cases; in truth the whole case depends upon" what "is a correct statement of the effect of the facts." His statement of the general rule of law is:⁴ "That where the relation of master and servant exists between one directing a thing to be done and those employed to do it, the master is considered in law to do it himself, and, as a consequence, that the master is responsible, not only for the consequences of the thing that he directed to be done, but also for the consequence of any negligence of his servants in the course of the employment, though the

Dissent of
Blackburn and
Mellor, JJ.

Statement
general rule
of law by
Blackburn, J.

¹ Erle, C.J., and Smith and Keating, JJ.

² 3 H. & C. 602, at 611, 612.

³ See *Turberville v. Stampe*, 1 L.d. Raym. 264.

⁴ 3 H. & C. at 609.

master was no party to such negligence, and even did his best to prevent it; as, in the ordinary case, where a master, selecting a coachman believed to be sober, sends him out with orders to drive quietly, and the coachman gets drunk and drives furiously. In such a case it may seem hard that the master should be responsible, yet he no doubt is if he be his master within the definition stated by Parke, B., in *Quarman v. Burnett*,¹ that the person is liable 'who stood in the relation of master to the wrongdoer—he who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey.' But the master is not liable for any negligence or tort of the servant which is not in the course of the employment, for such negligence or tort cannot be considered as in any way the act of the master." The learned judge then adds: "In the present case the difficulty is to apply these rules to the facts." Though the facts are peculiar, the report of them is not without value as bearing on the law applicable to a case of possibly not infrequent occurrence. "Supposing a miner employed in a coal mine (assuming him to be a servant) improperly and contrary to orders, for the purpose of lighting his pipe or anything of that sort, opens his safety lamp, and there is an explosion which kills a passer-by."² Though not identical, the case of *Williams v. Jones* would, in all probability, have a determining effect on such a case were it to arise.

Limpus v.
London
General
Omnibus
Company.

The law, as laid down in *Croft v. Alison*, was accepted in *Limpus v. London General Omnibus Company*,³ in the Exchequer

¹ 6 M. & W. 499, at 510. The relation of master and servant exists when the employer retains the right to direct not only what shall be done, but how it shall be done: *Railroad Company v. Hanning*, 15 Wall. (U.S.) 649, at 656. A person was held a servant who was employed under a written contract to sell sewing machines, and to be paid for his services by commissions on sales and collections. The company supplied a waggon, and he furnished a horse and harness to be used exclusively in the business. He furthermore agreed to give his whole time to the business, and to employ himself under the direction of the company under such rules as it or its manager should prescribe: *Singer Manufacturing Company v. Rahn*, 132 U.S. (25 Davis) 518. *Willet v. Boote*, 6 H. & N. 26, may also be noted as illustrating the relation of master and servant. There, by an agreement in writing, the appellant agreed to serve the respondents, potters, as biscuit oven placer, at daily wages for twelve months. By another agreement of the same date R. also agreed to serve them for the same period as biscuit oven fireman to be paid by piecework, he paying the appellant his wages out of what he earned. Held that the relation of master and servant subsisted between the respondents and the appellant notwithstanding his wages were paid by R.

² See evidence of Mr. R. S. Wright before House of Commons Committee on Employers' Liability for Injuries to their Servants, Parliamentary Papers, 1876, vol. ix. 47, quest. 605.

³ (1862) 1 H. & C. 526; *Howe v. Newmarch*, 94 Mass. 49. In *North v. Smith*, 10 C. B. N. S. 572, defendant was riding with his groom, past plaintiff, who was driving three horses with a waggon; as they passed, defendant put his horse to a trot, and the groom spurring his horse to keep up with his master, the horse struck out and injured the plaintiff. The Court held that there was negligence on the part of the groom, for which the master was liable, as being within the scope of the employment.

Chamber, where there was considerable discussion, and a difference of opinion as to its effect. An omnibus driver, contrary to printed instructions from his employers, endeavoured to hinder and obstruct the passage along the road of the plaintiff's omnibus; in consequence the plaintiff's omnibus was overturned. At the trial, Martin, B., in effect, directed the jury that, if a servant acts in the prosecution of his master's business for the benefit of his master, and not for the benefit of himself, the master is liable, although the act may, in one sense, be wilful on the part of the servant.¹ The defendants excepted to this direction, that the judge made the inquiry, whether the defendant's driver was doing what he believed to be for the interest of his employer, an essential part of the jury's duty; whereas the real question was, whether the driver thought the act necessary for carrying out his master's orders. The Exchequer Chamber (*dissentiente* Wightman, J.) were not of this opinion. "If a master employs a servant to drive and manage a carriage, the master is responsible for any misconduct of the servant in driving and managing it, which must be considered as having resulted from the performance of the duty entrusted to him, and especially if he were acting for his master's benefit, and not for any purpose of his own."² The expressions here used limit the rule to the case of the driver of a carriage; their effect is, of course, equally applicable to all cases where the relation of master and servant exists. Wightman, J.'s, objection was,³ that the act, though done by the driver "*whilst* employed in the service of the defendants, cannot be considered an act done by him *in the course of his service*."

Judgment of
the Exchequer
Chamber.

Ground of
Wightman,
J.'s, objection.

An earlier case, *Gregory v. Piper*,⁴ is to the same effect. The defendant employed a labourer to lay down rubbish near the plaintiff's land in order to obstruct the way, with special instructions not to let any of the rubbish touch the plaintiff's wall. As the rubbish became dry it naturally shingled down. Plaintiff sued for trespass and obtained a verdict, which was sustained on motion; since the trespass was the natural consequence of the act ordered to be done, and being as much the defendant's act as if

Gregory v.
Piper.

¹ See per Byles, J., at 541.

² Per Williams, J., 1 H. & C. 526, at 539. Where a quarrel arose between the servants of a tram company and of an omnibus company, and the tram-car servant got on the step of the omnibus to take the number of the driver, who, while whipping at him to get him down, struck the plaintiff, the defendants were held liable for an act done within the scope of their servant's authority: *Ward v. London General Omnibus Company*, 42 L. J. C. P. 265. For a case where the act of the servant commenced for the benefit of his master and terminated in an affray, provoked by the insulting language used to the servant, for which the master was held not liable, see *Peavy v. Georgia Railroad and Banking Company*, 12 Am. St. R. 334; *Mackenzie v. Goldie*, 4 Macph. 277.

³ 1 H. & C. at 536.

⁴ (1829) 9 B. & C. 591

Proposition
of Little-
dale, J.

Judgment of
the rest of the
Court.

done by his express command, an action in respect of it could be maintained. A proposition laid down by Littledale, J., seems rather too broadly expressed. He says:¹ "Where a servant does work by order of his master, and the latter imposes a restriction in the course of executing his order which it is difficult for the servant to comply with, and the servant, in execution of the order, breaks through the restriction, the master is liable in trespass."

The judgment of the other judges goes only the length of deciding that where the injurious consequence is a natural or probable result from the execution of the main business, the master must be held to have authorized the act, though in fact he may have forbidden it. The law presumes a servant to have the authority ordinarily necessary for doing the work his master gives him to do. If, in fact, he has not that authority, the master is still liable, provided that the servant assumes to exercise such authority; for the position the master places him in is a public advertisement that he has it; and secret instructions must not countervail open manifestations of authority. If the person wronged by the servant has knowledge of the secret limiting instructions, the law is otherwise; since to him the servant is no longer clothed with the general authority from which liability springs.

Joel v.
Morison.

Joel v. Morison was a case at *Nisi Prius*.² The plaintiff was knocked down by the defendant's cart while being driven by defendant's servant. Parke, B., directed, that if the defendant's servant took out his cart without leave defendant was not liable. Again, if the servant chose to visit a friend in the master's cart when not on the master's business, the master would not be liable;³ and the law is the same if the servant lent the cart to a person who was driving without the master's knowledge; or if he were on a frolic of his own, without being at all on his master's business.⁴ On the other hand, the master is liable if the servant, being on his master's business, takes a detour to call upon a friend; or if he is going on his way against his master's implied commands when driving on his master's business. The test proposed is, was the servant acting in the course of his employment at the time of the accident?

Sleath v.
Wilson.

Fenn v.
Harrison.

¹ 9 B. & C. at 594.

² (1834) 6 C. & P. 501.

³ Sleath v. Wilson, 9 C. & P. 607; approved in the American case, *Philadelphia and Reading Railroad Company v. Derby*, 14 How. (U. S.) 468, where the American rule is very comprehensively stated at 486; whether the default of the servant be one of omission or commission, whether negligent or fraudulent, "if it be done in the course of his employment the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment." *New Jersey Steamboat Company v. Brockett*, 121 U.S. (14 Davis) 637.

⁴ Fenn v. Harrison, 3 T. R. 757, at 762, 4 T. R. 177; *Mitchell v. Crassweller*, 13 C. B. 237.

The circumstances were slightly varied in *Booth v. Mister*.¹ Another person, not the servant of the defendant, was driving when the accident happened, and the servant whose duty it was to have charge of the cart was sitting beside him. Lord Abinger thought that the reins being held by another made no difference, but reserved the point. The ruling was not further questioned.

The law, as laid down by Parke, B., in *Joel v. Morison*, was approved in *Mitchell v. Crassweller* by the Common Pleas,² Jervis, C.J., saying: "I think, at all events, if the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant originally has started on his master's business; in other words, he must be *in the employ* of his master at the time of committing the grievance."

The signification of "acting in the course of the employment" is analysed in *Martin v. Temperley*. "The question is," says Coleridge, J.,³ "were the defendant and the persons employed by him master and servants? If they were, the general principle applies. And the tests leave no doubt that they were. First, the men were selected by the defendant; secondly they were paid by him; thirdly, they were doing his work; fourthly, they were under his control—that is, in doing the work in the ordinary way." Whether any act done is done in the employment is a question for the jury; and in *Whatman v. Pearson*,⁴ where a man in charge of a horse and cart had authority "to conduct the horse and cart during the day" the Court would not set aside a verdict against the employer on the ground that there was no evidence that the driver was acting in the scope of his employment, the evidence being that the man, contrary to his instructions, went home to dinner at a place about a quarter of a mile out of the line of his work, and left the horse and cart in the street before his house—hence the accident.

¹ 7 C. & P. 66.

² 13 C. B. 237, at 246.

³ 4 Q. B. 298, at 312.

⁴ (1868) L. R. 3 C. P. 422. See also *Edwards v. Vestry of St. Mary, Islington*, 22 Q. B. D. 338, which is distinguished from *Whatman v. Pearson*. In *Brady v. Giles*, 1 Moo. & R. 494, at 495, Lord Abinger, C.B., said: "It had always appeared to him that the Court of King's Bench had pursued an erroneous course in *Laugher v. Pointer* (5 B. & C. 547), when they allowed the question now raised to be discussed as if it were a question of law for the judge to decide. It always appeared to him that it was impossible to lay down any rule of law on such a point. No satisfactory line could be drawn, at which, as a matter of law, the general owner of a carriage, or rather the general employer of the driver, ceased to be responsible and the temporary hirer became so. Each case of this class must depend upon its own circumstances; and the jury, taking the circumstances in the present case into consideration, must undertake the task of deciding." "I think it was a question for the jury, whether Fisher in this case was a person having such authority": per Jervis, C.J., *Giles v. Taff Railway Company*, 2 E. & B. 822, at 830.

⁵ Per Byles, J., at 425; see also per Brett, J., *Burns v. Poulson*, L. R. 8 C. P. 563, at 570.

Storey v.
Ashton.

Rule of law
laid down by
Cockburn, C.J.

The cases were reconsidered by the Queen's Bench in *Storey v. Ashton*,¹ when Cockburn, C.J., said: "The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence in the course of his employment as servant. I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability: in such cases, it is a question of degree as to how far the deviation could be considered a separate 'journey.'"

Rule in
Kimball v.
Cushman.

An American case² states the sole inquiry to be, whether at the time the accident occurs the person in charge is so in charge of the defendant's property with the assent of the owner and engaged in his business and in respect to that property and business under his control, without any reference to the question whether the wrong-doer is in the general employment of another. And this must be indisputably so.

M'Laughlin v.
Pryor.

An old case, *M'Laughlin v. Pryor*,³ both illustrates and supports this proposition. Defendant and others hired a carriage and horses driven by postilions, the servants of the owner of the horses. Defendant rode upon the box. The postilions by misconduct overturned plaintiff's gig and injured plaintiff himself, for which he brought his action for trespass against defendant. Tindal, C.J., in holding the action maintainable, said: ⁴ "If he had remonstrated or expostulated with them at the time, I do not think he [defendant] could have been held liable in this action, even upon the supposition that the post-boys were his servants; for no servant can make his master a trespasser against his will." "Or if he had been inside the carriage, and had not seen what was going on, and the post-boys, of their own will had done the injury, I do not think the defendant would have been liable. But the fact of his being outside the carriage, with a full view of all that was taking place and not interfering, though I do not say it is strong evidence, is some evidence, to go to the jury that he assented to the act of the post-boys."⁵

¹ (1869) L. R. 4 Q. B. 476, at 479. *Storey v. Ashton* is distinguished in *Wilson v. Owens*, 16 L. R. Ir. 225, where the cases are collected in a considered judgment. *Rayner v. Mitchell*, 2 C. P. D. 357; *Johnson v. Pritchard*, 8 N. S. W. R. (Law) 6; *Quinn v. Power*, 87 N. Y. 535.

² *Kimball v. Cushman* (1870), 103 Mass. 194.

³ 4 M. & G. 48. *Wheatley v. Patrick*, 2 M. & W. 650, where a man having borrowed a horse and chaise and sitting along with the driver when the accident happened, for which action was brought, was held rightly "charged as in the possession and control of them." The inference drawn from somewhat similar facts was different in *Muse v. Stern*, 3 Am. St. R. 77. *Chandler v. Broughton*, 2 L. J. Ex. (N.S.) 25, is to the same effect as the case in the text.

⁴ 4 M. & G., at 58.

⁵ Distinguished in *Pike v. London General Omnibus Company*, 8 Times L. R. 164.

The inquiry as to the scope of a servant's employment being for the jury (unless the act is manifestly out of the course of the servant's employment, when a nonsuit is proper), the reported cases turn in nearly every instance either on the validity of the finding, or on the question of whether there is evidence for the jury.¹ The general principle of the law is clear, and has already been enunciated; the particular facts which embody the principle are of course infinitely various. To enumerate a few—after a verdict by a jury that the servant was on his master's business at the time of the accident, the master was held responsible, where the servant, who was possessed of a horse and gig, was going to see his medical attendant, and also purposed calling upon one of his master's customers for payment of a debt, and whilst on his way to the former place the accident occurred.² Thus, too, the plaintiff recovered; where defendant having hired a labourer for six weeks at weekly wages, the plaintiff, not knowing of such arrangement, employed the same labourer to do a job for him, which was being done, when the defendant claimed and received of the plaintiff payment for the job, on the ground, that the labourer's earnings during the six weeks belonged to him; upon which the plaintiff claimed for damages arising from the negligent way in which the work, thatching wheat, was performed;³ where the defendant having sent a barge to a wharf to be loaded, the lighterman in charge was unable to get to the wharf in consequence of plaintiff's barge lying in the way without any one in charge of it, and by direction of the foreman of the wharf, he pushed plaintiff's barge away and moored his own alongside, in such a way that on the ebbing of the tide the plaintiff's barge settled on a projection and was injured;⁴ where a stevedore employed to ship iron rails had a foreman whose duty it was (assisted by labourers) to carry the rails from the quay to the ship, and a carman having brought them to the quay was unloading them there, but, as he was not doing the work to the foreman's satisfaction, the latter got into the cart and threw out some of them so negligently that one of them fell upon and injured a person

Question of what is within the scope of a servant's employment for the jury.

Cases where the master was held liable.

¹ *M'Kenzie v. M'Leod*, 10 Bing. 385.

² *Patten v. Rea* (1857), 2 C. B. N. S. 606. In an Irish case, on somewhat similar facts, the Court refused to hold *as a matter of law*, that the master was responsible for the negligence of the servant: *Cormack v. Digby*, 9 Ir. R. C. L. 557. A herd got leave from his master to go for a day to a neighbouring town to transact business of his own, and borrowed his master's horse and tax cart for the purpose; it was afterwards agreed that he should bring home some meat from the town for his master. The accident, which was the cause of action, arose from negligence in driving.

³ *Holmes v. Onion*, 2 C. B. N. S. 790.

⁴ *Page v. Defries*, 7 B. & S. 137; overruling *Lamb v. Palk*, 9 C. & P. 629, where a coachman got off his box and seized hold of the heads of van horses which were obstructing his way, causing them to move, whereby a packing-case fell down and was broken.

who was passing ;¹ where the carman of a coal merchant, for the purpose of delivering coals at the premises of a customer, removed an iron plate in the foot-way which covered an opening communicating with the coal-cellar, no warning being given by the carman that the plate was taken up, and in consequence the plaintiff, who was passing along at the time, fell in and was injured ;² where the master of a ship made a deviation in order to perform salvage services ;³ and where plaintiff was standing on defendant's platform on his way from another company's terminus to the booking-office of a third company waiting for his luggage, and a porter of the defendants negligently drove a truck laden with luggage so that a portmanteau fell off and injured the plaintiff ;⁴ and yet again, where a nuisance arose from volumes of smoke issuing from furnaces inefficiently tended.⁵

Cases where
the master was
held not liable.

The act of the servant was held not within the scope of his authority, and the master consequently was held not liable ; where the defendant's servant burnt down a house demised to the defendant, by lighting furze and straw with a view to cleanse the chimney, which smoked ;⁶ where a local board of health, being in occupation of a sewage farm, and entrusted the management to B, and there being a ditch between the plaintiff's land and the farm, B went on the plaintiff's land and pared away his side of the ditch and cut away the brushwood and underwood that impeded the flow of the drainage, to render the ditch more capable of carrying off the drainage from the farm ;⁷ and where plaintiff occupied premises beneath the offices of the defendants, one of whom had a lavatory for his own use exclusively, and, his orders to his clerks being that no clerk should come into his room after he had left, a clerk going into the room to wash his hands at the lavatory after his employer had left, turned the water tap and negligently left it, so that water flowed from it into the plaintiff's premises and damaged them.⁸

¹ *Burns v. Poulson* (1873), L. R. 8 C. P. 563. Brett, J., dissented, on the ground "that the defendant's duty did not begin till the iron rails had been thrown out of the cart."

² *Whitely v. Pepper*, 2 Q. B. D. 276 ; *Clapp v. Kemp*, 122 Mass. 481 ; *Braithwaite v. Watson*, 5 Times L. R. 331. ³ *The Thetis*, L. R. 2 Adm. 365.

⁴ *Tebbutt v. Bristol and Exeter Railway Company*, L. R. 6 Q. B. 73.

⁵ *Barnes v. Akroyd*, L. R. 7 Q. B. 474.

⁶ *M'Kenzie v. M'Leod*, 10 Bing. 385. The definition of the words "the servant's duty," given by Alderson, B., seems quite inconsistent with the rule laid down in subsequent cases. "In that case the servant burnt the house down in trying to cleanse the chimney ; but it was distinctly shown that it was not her duty in any case to cleanse the chimney, but only to light the fire, and therefore she was not acting in the course of her employment" : per Blackburn, J., *Bayley v. Manchester, Sheffield, and Lincolnshire Railway Company*, L. R. 8 C. P. 148, at 152. See per Lord Ivory, *Baird v. Graham*, 14 Dunlop 615, at 620.

⁷ *Bolingbroke v. Swindon New Town Local Board* (1874), L. R. 9 C. P. 575.

⁸ *Stevens v. Woodward* (1881), 6 Q. B. D. 318 ; *Ruddeman v. Smith*, 5 Times L. R. 417. See *Wardrope v. Duke of Hamilton*, 3 Rettie 876, where employment as a

An American case¹ carries the liability of the master for the act of the servant to the very verge of absurdity—if, indeed, it should not be held considerably to have overstepped that verge. A female passenger, travelling in a railway car, was kissed by the conductor. The conductor was arrested, convicted on a criminal charge of assault, fined, and committed until the fine and the costs of the prosecution were paid; he was also discharged from the employment of the defendant company immediately upon their being informed of the charge made against him by the plaintiff. An action was brought against the railway company for the assault; the jury awarded large damages. No evidence of want of care in the selection of the servant was given. On appeal, Ryan, C.J., held that the defendants were clearly liable. “It is contended,” he says, in the course of a long judgment, plentifully garnished both with authorities and rhetoric,² “that though the principal would be liable for the negligent failure of the agent to fulfil the principal’s contract, the principal is not liable for the malicious breach, by the agent, of the contract which he was appointed to perform for the principal; as we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleeps while a wolf makes away with a sheep, the owner is liable; but if the dog play wolf, and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a *reductio ad absurdum*. The radical difficulty in the argument is that it limits the contract. The carrier’s contract is to protect the passenger against all the world; the appellant’s construction is, that it was to protect the respondent against all the world except the conductor, whom it appointed to protect her; reserving to the shepherd’s dog a right to worry the sheep. No subtleties in the books could lead us to sanction so vicious an absurdity.”

Peculiar
American
case.

Ryan, C.J.’s
judgment.

This case is absolutely irreconcilable with the English cases, where the obligation is, not to insure the fitness of the servant morally, but to use all reasonable precautions to obtain a servant in all respects suitable.³ The *onus* of shewing unsuitability is on

Criticized.

gamekeeper was held not to imply authority to shoot dogs; also *Baird v. Graham* (1852), 14 Dunlop 615, where a servant having put up his master’s horse which was glandered, but not to the knowledge of defendant, in pursuer’s stables, where it infected horses and cattle there, the master was held liable.

¹ *Croaker v. Chicago and North-Western Railroad Company* (1875), 17 Am. R. 504.

² *L. c.* at 510.

³ *Poulton v. London and South-Western Railway Company*, L. R. 2 Q. B. 534. In the *Queen v. Great North of England Railway Company*, 9 Q. B. 315, at 326. Lord Denman, C.J., said: “The Court of Common Pleas lately held that a corporation might be sued in trespass (*Maund v. The Monmouthshire Canal Company*, 4 M. & G. 452), but no body has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation which as such has no such duties cannot be guilty in these cases.” In *Ellis v. Turner*, 8 T. R. 531, at 533, Lord Kenyon, C.J., says: “The defendants are responsible

the plaintiff, and proof of the act sued on is not in an ordinary case evidence to fix the defendant with negligence in the appointment of the servant.¹ In *New Orleans, &c., Railroad Company v. Jopes*,² the rule laid down seems to be regarded as an exception in the case of railway companies.

Evidence of
employment.

In the class of cases we have been considering a difficulty not unfrequently arises in determining the identity of the defendant's servant. Thus in *Joyce v. Capel*,³ where a barge ran down a "lug boat" belonging to the plaintiff, it was proved that the name of Capel was on the barge, and the No. 1055, which was the number belonging to the defendant's barge, affixed in accordance with the regulations of the Waterman's Company; but when the men in the employ of the defendants were shewn to him at their wharf, he was unable to identify the man who steered the barge. Nevertheless Lord Denman, C.J., ruled that the plaintiff had discharged the *onus* upon him, and that there was *prima facie* evidence of the bargeman being the defendants' servant till they explained it. If, then, the fact was that the barge was on hire, it was for the defendants to shew it.

Hibbs v. Ross.

A case to be taken in connection with this is *Hibbs v. Ross*,⁴ where an accident having happened to the plaintiff, through the negligence of a shipkeeper on board a ship laid up in dock for the winter, the only evidence given to fix the defendant with liability was the certified copy of the ship's register, in which the defendant's name appeared as owner. This was held sufficient by the Court of Queen's Bench,⁵ though by a divided Court, on the ground that "the facts lie so entirely in the knowledge of the defendant, and may so easily be proved by him, that I think a jury would

for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them; as if he were to commit an assault upon a third person in the course of his voyage." The decision, nevertheless, has been followed by the Court of Appeals of New York in *Stewart v. Brooklyn and Crosstown Railroad Company*, 90 N. Y. 588, at 591, and in Ohio in *Gillingham v. Ohio River Railroad Company*, 29 Am. St. R. 827 (see note), and apparently approved by the Supreme Court of the United States; in *New Jersey Steamboat Company v. Brockett*, 121 U.S. (14 Davis) 637. This last case was distinguished in *New Orleans, &c., Railroad Company v. Jopes*, 142 U.S. (35 Davis) 18, on the ground that as a railway servant may use force to protect other passengers, so he may to protect himself. There is no misconduct where force is used in self-defence. But see *Lake Shore, &c., Railroad Company v. Prentice*, 147 U.S. (40 Davis) 101.

¹ See *post*, Incompetent Servants.

² 142 U.S. (35 Davis) 18.

³ 8 C. & P. 370. *Stables v. Eley*, 1 C. & P. 614, used to be cited for the proposition that if a man allows a carriage to go out with his name upon it, he holds himself out as liable for injury occasioned by the negligence of any person driving it. In this sense it has been determined in *Smith v. Bailey* (1891), 2 Q. B. 403, to be wrong. In that case it was suggested by Lord Esher, M.R., that the extent of the proposition should be that under such circumstances there would be *prima facie* evidence of liability, which might be met by shewing the truth of the matter. This view seems to accord with the cases quoted in the text.

⁴ L. R. 1 Q. B. 534.

⁵ By Blackburn and Lush, JJ., Mellor, J., dissenting.

be fully warranted in acting on the *prima facie* inference that the persons having the actual custody of the ship are employed by the owners, unless some evidence to the contrary is given.”¹

There is a series of cases on the power of a servant to arrest offenders against his master's property, mostly relating to the liability of railway companies for wrongful arrests by their servants. These require separate consideration. The general effect of them is to establish that the authority to arrest offenders is only implied where the duties which the officer is employed to discharge cannot be efficiently performed, unless he has the power to take prompt measures for apprehending offenders,² or cannot prevent the loss to his master's property committed to his charge otherwise than by taking or giving the offender into custody.

In each of the two earliest cases, *Eastern Counties Railway Company v. Richardson v. Broom*,³ and *Roe v. Birkenhead, &c., Railway Company*,⁴ the plaintiff, who had been arrested at a station for refusal to pay the fare demanded, brought an action for false imprisonment. In both the question arose as to the authority of the officers at the station to make the arrest, and in both it was held that there was not sufficient evidence of such authority to go to the jury. The former of these decisions is scarcely consistent with later authorities. In the latter, Parke, B., thought there was no proof that the servant “had ever received any general authority from the Company to arrest any person who did not pay his fare, nor was there any evidence of any course of dealing to shew that, as a servant of the Company, he was authorized to make any arrest on their behalf, much less that he had any direct authority to take the plaintiff into custody.”⁵

Both cases were decided in 1851. In 1853, in *Giles v. Taff Vale Railway Company*,⁶ the principle involved was more fully elucidated by the Exchequer Chamber. The question was whether there was evidence of the conversion of certain quicks belonging to the plaintiff by the Taff Vale Railway Company. The quicks had been brought in two parcels to two different stations belonging to the defendants; when asked for, reference was made to one Fisher, who was called “the general superintendent of the line,” and who refused to deliver them. The argument turned on whether Fisher's act bound the Company. The majority

¹ Per Blackburn, J., L. R. 1 Q. B. at 543.

² *Bank of New South Wales v. Owston*, 4 App. Cas. 270, at 288; *Allen v. London and South-Western Railway Company*, L. R. 6 Q. B. 65; *Abrahams v. Deakin* (1891), 1 Q. B. 516.

³ 6 Ex. 314.

⁴ 7 Ex. 36.

⁵ Cp. *Bank of New South Wales v. Owston*, 4 App. Cas. 270, at 285.

⁶ 2 E. & B. 822.

of the Court ¹ agreed that "it is the duty of the Company carrying on a business to leave upon the spot some one with authority to deal on behalf of the Company with all cases arising in the course of their traffic as the exigency of the case may demand." The whole of the Court,² however, assented that a "general superintendent" has authority to bind the Company in all matters requiring a prompt decision, if they arise in the course of the ordinary business of the Company.

Goff v. Great
Northern
Railway
Company.

In Goff v. Great Northern Railway Company,³ Blackburn, J.'s, comment upon Giles v. Taff Vale Railway Company,⁴ is: "The question in that case arose as to the evidence of authority to deal with goods, and, the language of the different judges being with reference to that subject, they speak only of the exigencies of traffic, or of the business of a carrier of goods; but the same principle is, we think, applicable to all exigencies that may be naturally expected to arise in the ordinary course of any business of the Company. If these are of such a nature that a decision must be come to on behalf of the Company promptly, the Company may reasonably be expected to authorize some one on the spot to decide for them in such cases."

The plaintiff in Goff's case had been arrested by an inspector of the Company, acting under the direction of a superintendent, for travelling on the line without a proper ticket. The Court said⁵ that "from the nature of the case, the decision whether a particular passenger shall be arrested or not must be made without delay, and as the case may be not of infrequent occurrence, we think it a reasonable inference that, in the conduct of their business, the Company have on the spot officers with authority to determine, without the delay attending on the convening the directors, whether the servants of the Company shall, or shall not, on the Company's behalf, apprehend a person accused of this offence. The explanation was added in a subsequent

¹ Jervis, C.J., Pollock, C.B., Alderson, B., Maule, J., Platt, B., Williams J., and Talfourd, J., 2 E. & B. at 829.

² Parke and Martin, BB., doubted as to certain facts of the case. See *The Apollo* (1891), App. Cas. 499.

³ (1861) 3 E. & E. 672, at 681. *Cox v. Midland Counties Railway Company*, 3 Ex. 268, decided that it is not incident to the employment of a station-master or other servants of a railway company to bind the company by contracts for surgical attendance on injured passengers. The authority of this case was questioned and shaken in *Walker v. Great Western Railway Company*, L. R. 2 Ex. 228, where it was held that the *general manager* of a railway company has, as incidental to his employment, authority to bind the company to pay for surgical attendance. See, too, *Moore v. Metropolitan Railway Company*, L. R. 8 Q. B. 36, "this case cannot be distinguished from *Goff v. Great Northern Railway Company*," per Lush, J., at 41, which "was a well-considered case, and the principles there laid down have never been deviated from," per Blackburn, J., at 38.

⁴ 2 E. & B. 822.

⁵ 3 E. & E. at 681.

case¹ that "by giving the guard authority to remove offensive passengers [the Company] necessarily gave him also authority to determine whether any passenger had misconducted himself."

A distinction was next drawn between acts which the Company could themselves do and those they had no authority to do, as marking the boundary line between acts within the implied authority of a superintendent and those outside it. Distinction between acts *intra vires* and *extra vires*.

In *Poulton v. London and South-Western Railway Company*,² a station-master took the plaintiff into custody because, as he erroneously supposed, he had not paid the fare for a horse that had been carried on the defendants' railway. By statute³ the station-master had authority to arrest and detain in custody any person that did not pay his fare; though where goods were not paid for they might only be detained.⁴ Since the Company could not themselves lawfully make an arrest, to do so was held outside the scope of the station-master's authority, and an act for which the Company could be no more responsible than if their servant had committed an assault or done any other act which the Company never authorized. The same principle was applied in *Edwards v. London and North-Western Railway Company*,⁵ where a foreman porter in temporary charge of a station was held to have no implied authority to arrest a person whom he suspected of stealing the Company's property. *Poulton v. London and South-Western Railway Company.*
Edwards v. London and North-Western Railway Company.

The general proposition that every servant who is entrusted with the property of his master has an implied authority to put the law in motion with reference to any offence that may be committed in connection with that property was considered in *Allen v. London and South-Western Railway Company*.⁶ Plaintiff took a ticket at one of the defendants' stations and tendered in payment a two-shilling piece. Amongst the change handed the plaintiff by the booking-clerk was a French two-sous piece, which the plaintiff refused to accept and the clerk to take back. The plaintiff then reached over the counter to put his hand into the bowl of the till which contained copper coin. The booking-clerk seized him, called a policeman, and the plaintiff was taken to the station and locked up for the night. The Court

¹ *Seymour v. Greenwood*, 7 H. & N. 355, at 358, where the declaration was for wrongfully turning a person out of an omnibus. See also *Walker v. South-Eastern Railway Company*, L. R. 5 C. P. 640. This case turns wholly on its peculiar facts.

² (1867) L. R. 2 Q. B. 534; *Charleston v. London Tramways Company*, 4 Times L. R. 157 (C. A.) at 629; *Mali v. Lord*, 39 N. Y. 381.

³ 8 & 9 Vict. c. 20, ss. 103, 104. See the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), sched.; and also The Regulation of Railways Act, 1889, (52 & 53 Vict. c. 57), s. 5.

⁴ 8 & 9 Vict. c. 20, s. 97.

⁵ (1870) L. R. 5 C. P. 445.

⁶ (1870) L. R. 6 Q. B. 65.

Judgment of
Blackburn, J.

held that the clerk had no authority to act as he did. Blackburn, J., said: "There is a marked distinction between an act done for the purpose of protecting property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who, he supposes, has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property, it is done merely for the purpose of vindicating justice. And in this respect there is no difference between a railway company—which is a corporation—and a private individual." Two possible cases of limitation are suggested: "If a man in charge of a till were to find that a person was attempting to rob it, and he could not prevent him from stealing the property otherwise than by taking him into custody, the person in charge of the till might have an implied authority to arrest the offender; or if the clerk had reason to believe that the money had been actually stolen, and he could get it back by taking the thief into custody, and he took him into custody with a view of recovering the property taken away, it might be that that also might be within the authority of a person in charge of a till."¹

Two limita-
tions of the
rule laid down
therein.

Van Den
Eynde v.
Ulster Rail-
way Company.

In an Irish case², three judges,³ in the Irish Exchequer Chamber, held—where the allegation against the plaintiff, and for which he had been arrested, was of stealing a ticket—that if the ticket-clerk and station-master had reasonable grounds for believing that a ticket had been abstracted they had implied authority from the railway company to detain the plaintiff in order to regain the ticket. The majority of the Court preferred to place their decision on the ground that there was evidence to shew that the Company's servants detained the plaintiff in the belief that he was attempting to travel on the defendants' railway without payment of his fare, by means of a stolen ticket, and that they were assuming to act within the powers of the Railways Clauses Consolidation Act, 1845.⁴

The Apollo.

There was great doubt expressed in the House of Lords whether the facts in *The Apollo*⁵ shewed an act within the scope

¹ Cp. *Blades v. Higgs*, 12 C. B. N. S. 501; 11 H. L. C. 621; when a servant has reasonable grounds for believing that property of his master entrusted to his charge has been wrongfully taken out of his custody, it is within the scope of his duty to detain a person whom he reasonably suspects as the wrongdoer in order to regain possession of the property, provided that in so doing he uses no unnecessary violence.

² *Van Den Eynde v. Ulster Railway Company*, 5 Ir. R. C. L. 6, 328.

³ *Monahan, C. J., Pigot, C. B., and Lawson, J.*

⁴ 8 & 9 Vict. c. 20, ss. 103, 104. See *ante*, 711, note 3. ⁵ (1891) App. Cas. 499.

of the authority of the acting harbour-master in that case. A ship in dock being injured required to take the ground for the purpose of being examined. There being no dry dock into which she could be put, the acting harbour-master suggested her being placed in the lock at the entrance of the dock. Before adopting this suggestion the master of the vessel made all reasonable inquiries, and received assurances which satisfied him. There was a ridge at the bottom of the lock, of the existence of which the master was not informed. His vessel being heavily loaded settled on this, and sustained severe injuries in consequence. In an action brought against the dock company for the negligence of their officer two points were made. First, that there was no duty on the harbour-master in regard to the plaintiff in the matter, and so no negligence. Secondly, that, if there were negligence, then the acts complained of were not done in the course of the harbour-master's duty or within the scope of his authority. As to the first the majority of the House of Lords were of opinion, based upon an examination of the terms of two special Acts of Parliament, that there was a duty on the harbour-master "to inform himself of the condition of the lock, and to ascertain that it was not such as to cause damage to the vessel." Secondly, as to the scope of authority, it was said by Lords Bramwell and Morris: "The normal use of the lock was for the passage of vessels, and the use of it as a substitute for a dry dock was an extraordinary and abnormal use of the lock."¹ The prevailing view was, however, that expressed by Lord Herschell:² "I think it must be within the scope of his" (the harbour-master's) "authority to point out in what part of the harbour the vessel may ground, and the lock was within the ambit of the port and harbour, and just as much a part of it as any other, and it had, as I have said, been used on various previous occasions, extending over a considerable period, for that purpose." This view certainly seems the more reasonable one. The harbour-master's authority is not limited to the making of contracts, as Lord Bramwell implies;³ it extends to the giving general directions to secure the efficient conduct of the dock company's business, or, in the words of Jervis, C.J., quoted by the Lord Chancellor,⁴ "to deal on behalf of the company with all cases arising in the course of their traffic as the exigency of the case may demand."

Duty of harbour-master.

Scope of harbour-master's authority.

Somewhat different is *Bayley v. Manchester, Sheffield, and Lincolnshire Railway Company*.⁵ There plaintiff was assaulted,

Bayley v. Manchester, Sheffield, and Lincolnshire Railway Company.

¹ Per Lord Morris (1891), App. Cas. 499, at 519.

² *L. c.* at 518.

³ *L. c.* at foot of 511.

⁴ *L. c.* at 507, from *Giles v. Taff Vale Railway Company*, 2 E. & B. 822, at 829.

⁵ L. R. 7 C. P. 415, in Ex. Ch. L. R. 8 C. P. 148.

Principle
of the cases.
Kelly, C.B.

not arrested. It was the duty of the company's porters to prevent passengers going by wrong trains. A porter seeing the plaintiff in a carriage, and conceiving it was a wrong one, pulled him out. The passenger was right; the porter wrong; the passenger was injured. The company were held liable on the ground that "where orders are given to some extent inconsistent, and such that it may not always be easy under all circumstances to comply literally with the provisions of all of them—for instance, where, as in the present case, there is a general order to prevent persons from travelling in the wrong carriage if possible, accompanied by a direction not to remove them from the carriage—it is obviously very likely that the servant may, while acting in the performance of the general duty cast upon him, neglect the particular direction as to the mode of doing it. But it appears to me that he will be none the less acting within the scope of his employment."¹

Bank of New
South Wales
v. Owston.

Bank of New South Wales v. Owston,² is chiefly valuable for a concise examination of the leading decisions by Sir Montague Smith.³ The particular point for decision was, whether an acting manager of a bank had authority to direct a prosecution where the clear inference from the evidence was that he was subordinate to the general manager, who was himself subject to the authority of the directors. The decision was, that no general authority to prosecute on behalf of the bank was given by his position alone; and this is in complete accord with the earlier cases.

Sir Montague
Smith's judg-
ment.

"In none of the cases referred to," it is said, "did the question of the authority of a manager or agent entrusted with the general conduct of his master's business arise. They were all cases of particular agencies where the agents had been appointed to a special sphere of duty. The result of the decisions in all these cases is that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge could not be efficiently performed for the benefit of his employer unless he had the power to apprehend offenders promptly on the spot; though it was suggested that possibly a like authority might be implied in the supposed cases of a servant in charge of his master's property arresting a man who he had reason to believe was attempting to steal or had actually stolen it. In the latter of these cases it is part of the supposition that the property might be got back by the arrest, but in such a case the time, place, and opportunity of acting would be material circumstances to be considered in determining the question of authority."⁴

¹ Per Kelly, C.B., L. R. 8 C. P. at 153.

² 4 App. Cas. 270.

³ L. c. at 288.

⁴ Ashton v. Spiers and Pond, 9 Times L. R. 606 (C. A.)

In the subsequent case of *Abrahams v. Deakin*,¹ Lord Esher, adopted in *M.R.*,² speaking about the *Bank of New South Wales v. Owston*,³ every respect by Lord Esher, *M.R.* said: "Though we are not bound by that decision, I have no intention of differing from it; on the contrary, I adopt it in every respect." The same learned judge, in the *same* case,⁴ thus summarizes the effect of *Allen v. London and South-Western Railway Company*:⁵ "Although a servant is acting with a view to protect his employer's property against similar" (*i.e.* felonious) "attempts in the future, he has no implied authority to take a man into custody for that which has already been done." This, then, may be taken as embodying the last and most explicit declaration of the law on this subject.

A word must be added on the liability criminally of the master for the act of his servant. It is a general principle of law that a man is not liable criminally for the act of his servant, but such a liability is sometimes imposed by statute.⁶ It is obvious, however, that the master is liable for the criminal acts of the servant when he has expressly commanded them or personally co-operated with the servant in their commission.⁷ The law may perhaps be more correctly stated by saying that the relation of master and servant does not render the master the less liable to answer when he is accessory, whether before or after the fact, than if no relation of master and servant existed.⁸ If the master co-operates with the servant the master is then himself a principal, and must answer for his own wrongdoings. No amount of mere negligence short of becoming an accessory, or aiding, abetting, or inciting the commission of an offence renders the master criminally liable for his servant's crime.

"I know," said Pollock, B., in *Roberts v. Woodward*,⁹ "of no instance in which a master is criminally liable for the act of his servant, unless he is made so by statute, or unless the act of the servant is, from its very nature, obviously the act of the master. The instances cited in the argument are inapplicable to this case (*i.e.*, the offence of giving short weight in a sale of coals). In the case of a servant selling an indecent book, it would be presumed to be the act of the master, who was keeping indecent books for

¹ (1891) 1 Q. B. 516.

² *L. c.* at 521.

³ 4 App. Cas. 270.

⁴ (1891) 1 Q. B. at 520.

⁵ *L. R.* 6 Q. B. 65.

⁶ *Woodgate v. Knatchbull*, 2 T. R. 148.

⁷ *Foster*, Cr. Cas. 125; as to the criminal liability of the sheriff, *Woodgate v. Knatchbull*, 2 T. R. 148. *Ante*, 327.

⁸ *E.g.*, *Brown v. Foot*, 61 L. J. M. C. 110.

⁹ 25 Q. B. D. 412. *Hardcastle v. Bielby* (1892) 1 Q. B. 709. There is a discussion as to the extent to which the acts and declarations of an agent may affect his principal criminally in Lord Melville's case, 29 How. St. Tr. 747 *et seqq.*

sale; and the liability of a master for the act of his servant in supplying drink to a constable on duty arises, not by virtue of an express statutory enactment that he should be liable, but because to permit him under such circumstances to avail himself of a plea that he was ignorant of his servant's acts would be contrary to the whole spirit of legislation on the subject."

Argument in
Lyon v. Mells.

Holroyd,¹ however, in arguing in *Lyon v. Mells*,² says, as if the proposition were indisputable: "Where a bricklayer's servant leaves the rubbish of his work in the street, the master is indictable for the nuisance." If this statement of the law be correct, the servant's act seems no more "obviously the act of the master" than giving short weight in a sale of coals.³

Cases of
criminal
liability noted.

Some *quasi*-criminal cases there are where the master is liable for the act of his servant. For example, in *The King v. Dixon*⁴ it was held that if a master baker puts alum in his bread he is liable criminally for injurious consequences brought about by his servant's disregard of his instructions. The chief head of this *quasi*-criminal responsibility is found in the cases under the revenue laws. A master is answerable for the illegal act of his servant, if within the scope of his probable authority, and done for the master's benefit. Thus, in *Attorney-General v. Siddon*,⁵ where, after the detection of smuggled tobacco concealed in a cellar, a servant in his master's absence procured a permit by which he intended to protect the goods from seizure, the master was held liable for the penalty attached to the offence of unduly using a permit; because "this is not properly a criminal proceeding; but, as a civil proceeding for the debt of the Crown, it is penal in its nature, as are also informations for penalties on the statutes of usury, or against a master for the giving unstamped receipts by his servants. Whether the information here is penal or civil in its nature, the act of the servant is by law to be considered as done by the master, if it is within the scope of the probable authority which must be considered to be given by the master to the servant, for the carrying on the business of the former."⁶

Attorney-
General v.
Siddon.

Case of libel.

In criminal proceedings for libel, too, a sale by the servant in the shop of the master, without the knowledge, privity, or concurrence of the master in the sale, or even without a knowledge of the contents of the libel sold, is sufficient evidence to convict the master, though liable to be contradicted.⁷ So also

¹ Afterwards Mr. Justice Holroyd.

² 5 East 428, at 432.

³ Cp. *Blaker v. Tillstone* (1894), 1 Q. B. 345.

⁴ 3 M. & S. 11.

⁵ 1 Tyr. 41.

⁶ Per Bayley, J., at 49.

⁷ *Rex v. Almon*, 20 How. St. Tr. 803, at 838, 5 Burr. 2686. See *The Queen v. Holbrook*, 3 Q. B. D. 60, 4 Q. B. Div. 42; *Emmens v. Pottle*, 16 Q. B. Div. 354.

where a public nuisance is caused by the way in which a man's servants conduct his business, the master is indictable,¹ as he is also under the special language of particular Acts of Parliament.² As a general principle, however, in the absence of special legislative provision, where proceedings are a prosecution for a crime, the master is not liable for the act of his servant.³

The territorial limits of the application of the principle *Respondeat superior* was considered in *The M. Moxham*.⁴ It was proved in that case that an English company possessed a pier in a Spanish port, which was injured by an English ship being driven against it, through the negligence of the crew. It was admitted that if the law of Spain were applicable the shipowners were not liable. The plaintiff's contention was, in effect, that the ship carried the principle of *Respondeat superior* with her to Spain. This contention was overruled by the Court of Appeal. The *ratio decidendi* was thus most forcibly stated by James, L.J.: "One can understand that a contract between master and servant, or the relations between principal and agent, may affect a contract made by the agent *quod* agent with foreigners, that is to say, it may affect the nature and extent of his agency; but the liability of one man to answer for the acts of another in matters of tort seems a thing which cannot be carried by the agents into a foreign country. If I take my coachman to France, and he, in driving my carriage, injures a carriage in France, I do not take with me the law of *Respondeat superior* so as to make me liable. It seems to me that the law of the country in which we are trying the question does not apply, but it is the law of the place where the act is done which does apply."

¹ *The Queen v. Stephens*, L. R. 1 Q. B. 702. See also *Commonwealth v. Stevens*, 153 Mass. 421, 25 Am. St. R. 647.

² *E.g.*, *Mullins v. Collins*, L. R. 9 Q. B. 292; *Redgate v. Haynes*, 1 Q. B. D. 89; *Cundy v. Lecocq*, 13 Q. B. D. 207; *Bond v. Evans*, 21 Q. B. D. 249, and the discussion of these cases in *Somerset v. Wade* (1894), 1 Q. B. 574. See also *Massey v. Morris* (1894), 2 Q. B. 412. Cp. the American cases, *Commonwealth v. Holmes*, 119 Mass. 195; *Commonwealth v. Pratt*, 126 Mass. 462. For breach of excise law, 2 Will. IV. c. 16, s. 13, affecting the master with criminal responsibility, see the *Advocate-General v. Grant*, 15 Dunlop 980.

³ *Newman v. Jones*, 17 Q. B. D. 132. See as to a proceeding under 16 & 17 Vict. c. 128, *Chisholm v. Doulton*, 22 Q. B. D. 736; also *Budd v. Lucas* (1891) 1 Q. B. 408.

⁴ 1 P. D. 107. See *Pritchard v. Norton*, 106 U. S. (16 Otto) 124.

CHAPTER III.

LIMITATIONS ON EMPLOYER'S LIABILITY WHERE WORK IS DONE UNDER AN INDEPENDENT CONTRACT.

THE relation between contractor and employer is much more complicated than that between master and servant; and legal opinion on the subject, after having undergone considerable fluctuations, has at length settled itself, in a course of decision, quite opposite to the line of the earlier cases.

View formerly
prevalent.

For a long time there was a strong inclination to favour the proposition that a person is answerable for any injury which arises in carrying into execution that which he has employed another to do;¹ and to hold that the question whether a man were contractor or servant made no difference whatever in the liability of his employer.²

View accepted
at present.

The tendency then changed, and ultimately the view was adopted that limited the liability of the owner of premises to those acts which he definitely authorizes, or that are in the nature of a nuisance which he permits. In the words of Lord Westbury:³ "It would create confusion in all things if you were to say that the man who employs others for the execution of such a work, or the man who is a party to the employment, has no right whatever to believe that the thing will be done carefully and well, having selected, with all prudence, proper persons to perform the work, but that he is still under an obligation . . . to interpose from time to time in order to ascertain that that was done correctly and properly, the business of doing which he had rightfully and properly committed to other persons." It is the progress of legal authority from the former to the latter of these views that we have now to consider.

Dictum of Lord
Westbury.

¹ Eyre, C.J., in *Bush v. Steinman*, 1 B. & P. 404, at 407, says, indeed, this "seems to be too large and loose"; but no other principle is substituted as the basis of the decision.

² Per Eyre, C.J., 1 B. & P. 404, at 408.

³ *Daniel v. Metropolitan Railway Company*, L. R. 5 H. L. 45, at 61.

The leading case on the earlier view of the law is *Bush v. Steinman*.¹ A having a house by the roadside, contracted with B to repair it. The materials were to be furnished by C and D. D's servant brought a quantity of lime and placed it in the road; the plaintiff's carriage was driven against it and upset. The Court held A liable for the damage sustained. At the trial, Eyre, C.J., had nonsuited; on the motion he changed his opinion: "Though I still feel difficulty in stating the precise principle on which the action is founded, I am satisfied with the opinion of my brothers."² Three cases were relied on—*Stone v. Cartwright*,³ *Littledale v. Lord Lonsdale*,⁴ and a case stated upon the recollection of Buller, J. *Stone v. Cartwright* was a case of injury done upon the land of the defendant's⁵ principal, and by the principal's servants; the actual decision being that an action must be brought "against the hand permitting the injury, or against the owner for whom the act was done."⁶ A case that proceeds on the assumption of the existence of the relation of master and servant is no authority where the relation of master and servant does not exist.⁷

The next case is *Littledale v. Lord Lonsdale*.⁸ "Lord Lonsdale's colliery was worked in such a manner by his agents and servants (or possibly by his contractors, for that would have made no difference), that an injury was done to the plaintiff's house, and his Lordship was held responsible. Why? Because the injury was done in the course of his working the colliery." The acts done were on the property of the defendant, and were done in the course of working mines (for which purpose the land was occupied), and were in the nature of a nuisance interfering with the property of a neighbour. If, too, the working was done by agents or servants working in the method prescribed by the master, a difference of the rule applicable is apparent. For here again the reasoning proceeds from the relation of master and servant to a relation not that of master and servant. The validity of the

¹ (1799) 1 B. & P. 404; *Hilliard v. Richardson*, 69 Mass. 349; *Bigelow*, L. C., on Torts, 636.

² 1 B. & P. at 408.

³ 6 T. R. 411. See per Kelly, C.B., *Weir v. Barnett*, 3 Ex. D. 32, 40.

⁴ 1 B. & P. 407.

⁵ "He hired and dismissed the colliers at his pleasure," 6 T. R. 411.

⁶ Per Lord Kenyon, C. J. 6 T. R. 411 at 412.

⁷ "The relation between master and servant as commonly exemplified in actions brought against the master is not sufficient": per Eyre, C.J., at 406-7.

⁸ 1 B. & P. 407. This case is reported as *Earl of Lonsdale v. Littledale*, in 2 H. Bl. 267, 299, and is on the point that a peer of Parliament, having pleaded in chief to a bill cited against him in the Court of King's Bench, cannot afterwards assign for error that he ought to have been sued by original writ and not by bill. The facts may, however, be collected from the pleadings set out in the report. Those in the text are taken from Eyre, C.J.'s judgment in *Bush v. Steinman*.

reasoning is therefore dependent on the essential identity of two relations; and this identity does not in fact exist. The case is accordingly distinguishable from *Bush v. Steinman*; and the decision must be sustained on independent grounds.

Case recol-
lected by
Buller, J.

Examined.

The third case was one "my brother Buller recollects."¹ "It was this; a master having employed a servant to do some act, the servant out of idleness employed another to do it, and that person, in carrying into execution the order which had been given to the servant, committed an injury to the plaintiff, for which the master was held liable." The facts as given are very vague. Assuming that the case was well decided, the relation of master and servant is stated to exist, a relation that may be sufficient for the decision, and which did not exist in *Bush v. Steinman*. It would also be necessary to presume an authority empowering the servant to delegate his duties.² If the servant had not this power, as probably he had not, the injury may have been regarded as resulting from an act done by the servant in the course of his employment; he was directed to do work, and his way of doing it caused injury to a third person; or else from an act of the servant's done in the interest of his master, and in order to facilitate his business in a matter with the conduct of which the servant was intrusted.

Other cases were referred to by the other judges, which may be classed either as acts done by servants or agents under efficient control of the defendants, or as nuisances created upon the premises of the defendants, and causing injury to the plaintiffs.

Special facts
in *Bush v.*
Steinman.

In *Bush v. Steinman* the servant of the lime-burner was, in no ordinary sense, the servant of the defendant. There was no nuisance on the defendant's land. The lime was not on the defendant's land at all, and he had no control over the person who placed it where it actually was placed.

Judgment of
Heath, J., in
Bush v.
Steinman.

Heath, J., takes the short ground:³ "All the sub-contracting parties were in the employ of the defendant." This is almost in terms a statement of the proposition that a person is answerable for any injury arising in the execution of work which he has employed another to do. Rooke, J., states the same proposition in

¹ 1 B. & P. 408.

² "If I select a person in whom I place confidence, can he employ another?" per Lord Campbell, C.J., *Sadler v. Henlock*, 4 E. & B. 570, at 575. This point, if it needs decision, has been definitely decided in America. A servant, not having express authority to employ other servants, engaged one G to assist him in moving a crate of crockery. Through the negligence or inefficiency of G, combined with carelessness of the servant himself, the crate was overturned. Held, that the employer was not liable, as the acts done were outside the servant's authority. *Jewell v. Grand Trunk Railway Company*, 55 N. H. 84.

³ 1 B. & P. at 408.

different words:¹ "The person from whom the whole authority is originally derived is the person who ought to be answerable, and great inconvenience would follow if it were otherwise."

This position has long since ceased to be law.

Two *Nisi Prius* cases before Lord Ellenborough, however, gave sanction to the leading decision.

In *Sly v. Edgeley*,² defendant, who owned cottages which were subject to be overflowed, employed a bricklayer to sink a sewer in the street. The bricklayer was negligent, and the plaintiff was injured. The defence was that the bricklayer was not the servant to the defendant. Lord Ellenborough is reported to have said: "It was the rule of *Respondeat superior*, what the bricklayer did was by the defendant's direction." It may well be, then, that the bricklayer was, in the opinion of the jury, a mere servant; the case would then not differ from *Sadler v. Henlock*,³ and may be thus sustained. But the marginal note is: "If a person employs a tradesman to do any work for him, and in the execution of it the tradesman or his servants by their negligence cause an injury to any one, the person employing them is liable for the injury arising from such neglect." This is not borne out by the case as reported; and, if it were, has long since been held to be incorrect.

The other *Nisi Prius* case is *Matthew v. West London Water Works Company*.⁴ Defendant contracted with pipelayers to lay down pipes for the conveyance of water through the streets of the city. The pipelayers' workmen were negligent; and Lord Ellenborough held that the plaintiffs could recover; though no reason is given.

Maule, J., in *Overton v. Freeman*,⁵ alluding to this decision, says: "It is but a *Nisi Prius* case; the report is short and unsatisfactory; and the particular circumstances are not detailed."

*Leslie v. Pounds*⁶ can be maintained altogether independently of *Bush v. Steinman*, and, therefore, lends no support to it. Defendant was the proprietor of a house; Daniels was his lessee, who, for about six months previously to the action being brought, had ceased to occupy in order to have the house thoroughly repaired; the repairs were done at the expense of the lessee, but under the superintendence of the defendant. Defendant had been remonstrated with by the local authority on the dangerous state of a cellar-door opening in the pavement; he had promised to take care of it, and had put some boards over the cavity as a temporary covering. These got displaced; the plaintiff fell into the

¹ 1 B. & P. at 410.

² 4 E. & B. 570.

³ 11 C. B. 867, at 872.

⁴ 6 Esp. (N. P.) 6.

⁵ 3 Camp. 403.

⁶ 4 Taunt. 649.

cellar, and was hurt. The Court held that the plaintiff could recover, for "the defendant takes on himself these repairs, not as the agent of Daniels, but as the landlord of the house." The defendant had personally interfered about his own property, and therefore the fact that he had an agreement about it with a third person became immaterial. Neither of the grounds on which *Bush v. Steinman* was decided—that all the sub-contracting parties were in the employ of the defendants; and that the case was within the rule of the three authorities¹—has any material bearing on the decision in *Leslie v. Pounds*.

Laugher v. Pointer.

Judgments of
Holroyd and
Bayley, JJ.

In *Bush v. Steinman*, Heath, J., says :² "Where a person hires a coach upon a job, and a job coachman is sent with it, the person who hires the coach is liable for any mischief done by the coachman while in his employ, though he is not his servant." This is precisely the point raised in *Laugher v. Pointer*.³ At the trial, Abbott, C.J., directed a nonsuit. A rule *nisi* for a new trial was granted. On the argument, the judges differing, the case was directed to be argued before the twelve judges, all of whom, except the Chief Baron, met for that purpose in Serjeants' Inn Hall. Judgment was ultimately given by the judges of the King's Bench; when Littledale, J., and Abbott, C.J., were for discharging the rule, Holroyd and Bayley, JJ., holding the nonsuit to be wrong. Holroyd and Bayley, JJ., founded themselves on the authority of *Bush v. Steinman*, which was cited for the propositions that "responsibility is not confined to the immediate master of the person who committed the injury, and that the action may be brought against the person from whom the authority flows to do the act, in the negligent execution of which the injury has arisen."⁴ Those propositions being established, it was argued the liability follows.

Judgment of
Littledale, J.

Littledale, J., controverts this in two ways⁵—First, by an examination of authorities tending to show that the owner of the horse would be liable; and (since "the law does not recognize a several liability in two principals who are unconnected"), liable to the exclusion of the traveller. Secondly, by drawing the distinction that in *Bush v. Steinman* "the injury was done upon or

¹ *Stone v. Cartwright*, 6 T. R. 411; *Earl of Lonsdale v. Littledale*, 2 H. Bl. 267; *Buller, J.'s case*, 1 B. & P. 408.

² 1 B. & P. 404, at 409.

³ (1826) 5 B. & C. 547. The case of charterers of ships and shipowners was referred to in the judgments; with reference to this class of cases, *Fenton v. Dublin Steam Packet Company*, 8 A. & E. 835, and *Dalyell v. Tyrer*, E. B. & E. 899, may be looked to.

⁴ Per Holroyd, J., 5 B. & C. 547, at 567.

⁵ 5 B. & C. 556; *Fletcher v. Braddick*, 2 B. & P. (N. R.) 182. As to this case see the note *ante*, 263. *Nicholson v. Mouncey*, 15 East 384; *Sammell v. Wright*, Esp. (N. P.) 263; *Dean v. Branthwaite*, 5 Esp. (N. P.) 35.

near and in respect of the property of the defendants, of which they were in possession at the time. And the rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that whether his property be managed by his own immediate servants or by contractors or their servants."¹ *Smith v. Lawrance*² came before the same Judges that had differed in *Laugher v. Pointer*; the facts were identical, except that the horses were post-horses, and not job-horses. This distinction was taken hold of by Bayley, J., as shewing that "they are taken never to be out of the possession of their actual owner," and the Court unanimously held the defendant liable.

In *Quarman v. Burnett*,³ where the horses were job-horses, the view of Littledale, J., and Abbott, C.J.—viz., that the hirer was not, but the job-master was liable—was adopted, and has since been followed. *Quarman v. Burnett.*

As to the rule of law suggested by Littledale, J., as applicable to fixed property, Parke, B., says⁴ that "it appears to us to be quite satisfactory; and the general proposition above referred to" *View of Littledale, J., and Abbott, C.J., prevails.* (i.e., that a person is liable for any injury which arises from the act of another person, in carrying into execution that which that other person has contracted to do for his benefit, and not merely for the acts of his own servant), "upon which only can the defendants be liable for the acts of persons who are not their servants, seems to us to be untenable."

Among the cases referred to in *Quarman v. Burnett* was *Randleson v. Murray*.⁵ A warehouseman employed a master porter to remove a barrel from his warehouse. The master porter employed his own men and tackle; through the negligence of the men, the tackle failed, the barrel fell and injured the plaintiff. The argument was that the men whose negligence caused the injury were not the servants of the warehouseman, or that at *Randleson v. Murray.*

¹ Cp. *White v. Jameson*, L. R. 18 Eq. 303, and *Saxby v. Manchester, Sheffield, and Lincolnshire Railway Company*, L. R. 4 C. P. 198.

² (1828) 2 Man. & Ry. 1.

³ (1840) 6 M. & W. 499. It was attempted to carry the cases somewhat farther in *M'Laughlin v. Pryor*, 4 M. & G. 48, but Tindal, C.J., held that the conduct of the defendant, who sat on the box and assented to the wrongful action of the post-boys, made him *dominus pro tempore*. *Shiells v. Edinburgh and Glasgow Railway Company*, 18 Dunlop 1199, is a Scotch decision in point. See also *Muse v. Stern*, 3 Am. St. R. 77. In *Jones v. Corporation of Liverpool*, 14 Q. B. D. 890, *Quarman v. Burnett* was followed, defendants being held not liable for the negligence of the driver of a water-cart supplied to them with a horse under contract. Grove, J.'s, opinion that there is a difference between the cases of a master lending a general servant for a consideration and lending him gratuitously was overruled in *Donovan v. Laing, Wharton, and Down Construction Syndicate* (1893), 1 Q. B. 629.

⁴ 4 M. & G. at 571.

⁵ 8 A. & E. 109.

least the question was for the jury.¹ Lord Denman, C.J., considered that, "had the jury in this case been asked whether the porters, whose negligence occasioned the accident, were the servants of the defendants, there can be no doubt they would have found in the affirmative." Littledale, J., probably having in his mind the rule he suggested in *Laugher v. Pointer*, was of opinion that it made "no difference whether the persons whose negligence occasions the injury be servants of the defendant, paid by daily wages, or be brought to the warehouse by a person employed by the defendant." Had the jury taken Lord Denman's view there can be no doubt as to the justice of the decision. It is perhaps with reference to the other view, that the men were

Pollock, C.B.'s,
comment on
the case.

Lord
Denman's.

not the servants of the warehouseman, that Pollock, C.B., says in *Murphy v. Caralli*,² "The case of *Randleson v. Murray* seems at variance with the current of authority." Lord Denman, in commenting on *Randleson v. Murray* in *Milligan v. Wedge*,³ says: "The work was, in effect, done by the defendant himself at his own warehouse: if he chose, instead of keeping a porter, to hire one by the day, he did not thereby cease to be liable for injury done by the porter while under his control." Considered from this point of view, the case accords with the later authorities.⁴

Milligan v.
Wedge.

*Milligan v. Wedge*³ marks the first recession from the doctrine advanced by Littledale, J., in *Laugher v. Pointer*, of a special rule attributable to real property, and adopted by Parke, B., in *Quarman v. Burnett*. Referring to the latter case, Lord Denman, C.J., says: "It may be another question whether I should agree in all the remarks delivered from the bench in that case; if I felt any doubt, it would be, whether the distinction as to the law in the case of fixed and of moveable property can be relied upon."

In *Milligan v. Wedge*,³ the buyer of a bullock employed a licensed drover to drive it. The drover employed a boy. Damage was done by the bullock through the boy's careless driving. The case was argued on the ground taken in *Bush v. Steinman*—"the person from whom the whole authority is originally derived, is the person who ought to be answerable, and great inconvenience

¹ *Brady v. Giles*, 1 Moo. & R. 494.

² 3 H. & C. 462, at 465.

³ 12 A. & E. 737, per Lord Denman, C.J., at 741.

⁴ In *Peachey v. Rowland*, 13 C. B. 182, at 186, Manle, J., says: "*Randleson v. Murray* was not the case of a public wrong, but some one caused a board to fall upon the plaintiff; it did not appear that the place where the accident happened was a public way; and Lord Denman said there was evidence to go to the jury whether the persons who caused the mischief were the servants of the defendant, employed by him to do the work in the particular way they did. No doubt, a man may maintain an action for an injury negligently occasioned to him in a place where he lawfully was at the time, and in some instances, and under some circumstances—as in the much contested cases of the dog-spears and the spring-gun—in places where he was trespassing."

would follow if it were otherwise "¹—but the Court adhered to the opinion of Littledale, J., and Abbott, C.J., in *Laugher v. Pointer*, confirmed by the Court of Exchequer in *Quarman v. Burnett*, and held that the drover was a person carrying on a distinct employment of his own,² and that, unless the relation of master and servant exist between the owner of the bullock and the licensed drover, the act of the one creates no liability in the other.³

It was sought, but unsuccessfully, to bring the facts in *Martin v. Temperley*⁴ within the rule in *Milligan v. Wedge*. The owner of a barge hired two licensed persons to navigate it; by their negligent management plaintiff's boat was injured. The distinction was taken that in *Milligan v. Wedge* the drover was pursuing a separate trade, while in *Martin v. Temperley* he was merely a servant selected out of a number limited by Act of Parliament, among whom "the defendant had the power of selection, though from a limited number; and no case has gone so far as to decide that the person hired ceases to be the servant of the person hiring if he is necessarily selected from a number, though limited."⁵

Assuming the facts to be correctly interpreted in *Milligan v. Wedge*, the distinction in law between that case and *Martin v. Temperley* seems just, and in accordance with the authorities.

The decision in *Rapson v. Cubitt*⁶ was entirely on the ground that the relation between the defendant and the person through whom the injury occurred was that of contractor and sub-contractor, and not that of master and servant. Defendant, a builder, was employed by the committee of a club to execute alterations at a club-house. He made a sub-contract with a gas-fitter, through whose negligence the gas exploded and injured the plaintiff. Parke, B., said: "The true rule on this subject was laid down by this Court in the case of *Quarman v. Burnett*, which is directly in point, and cannot be distinguished from the present case. The Court there said: 'The liability by virtue of

¹ 1 B. & P. 404, per Rooke, J., at 410.

² Per Littledale, J., *Laugher v. Pointer*, 5 B. & C. 547, at 555.

³ See, too, *Cuthbertson v. Parsons*, 12 C. B. 304, where commissioners under an Act of Parliament entered into an arrangement with steam-boat proprietors to provide boats. Held, that the commissioners were not liable on the occurrence of an accident. *Cuthbertson v. Parsons* is decided on its special facts, and does not seem to elucidate any principle.

⁴ 4 Q. B. 298. *Slater v. Mersereau*, 64 N. Y. 138; also a curious case where defendant, an undertaker, was sued for damage done to plaintiff by a carriage in the procession owned by the driver; the driver was held to be a sub-contractor: *Boniface v. Relyea*, 36 How. (N. Y.) Pr. 457. The Scotch Court of Session, in *M'Lean v. Russell*, 12 Dunlop 887, dissented from *Bush v. Steinman*, and followed *Rapson v. Cubitt*.

⁵ Per Patteson, J., 4 Q. B. 298, at 310.

⁶ (1842) 9 M. & W. 710.

the principle of relation of master and servant must cease when the relation itself ceases to exist, and no other person than the master of such servant can be liable on the simple ground that the servant is the servant of another, and his act the act of another; consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable.'” Parke, B., takes the occasion to reiterate his adhesion to Littledale, J.’s, doctrine with reference to a different rule being applicable to real and to movable property. It would seem, that on this principle an action was maintainable against the club committee; unless the plaintiff, being their servant, were disentitled to bring it.

Burgess v.
Gray.

In *Burgess v. Gray*¹ the facts bore a great resemblance to *Bush v. Steinman*. The owner of premises adjoining a highway employed one Palmer to make a drain. Palmer’s men put gravel on the highway, in consequence of which the plaintiff was injured. The question was whether there was evidence that the defendant “sanctioned the placing of the nuisance on the road”;² the Court held there was. The case is important as shewing an anxiety not to base the decision on the controverted doctrines of *Bush v. Steinman*, and to prefer the simpler and more indubitable ground that the defendant had, by his acts, made an admission that he was exercising dominion.

Allen v.
Hayward.

*Allen v. Hayward*³ is another case where the wrongful act was done in relation to real property, yet the Queen’s Bench held the defendants not liable. “On a careful reference,” says Lord Denman, C.J., “to *Laugher v. Pointer*⁴ (in which the opinions delivered by Lord Tenterden and Littledale, J., must be taken to lay down the correct law), *Randleson v. Murray*,⁵ *Quarman v. Burnett*,⁶ *Milligan v. Wedge*,⁷ and *Rapson v. Cubitt*,⁸ it seems perfectly clear that, in an ordinary case, the contractor to do works of this description [*i.e.*, the diversion of a creek] is not to be considered as a servant, but a person carrying on an independent business, such as the commissioners were fully justified in employing to perform works which they could not execute for themselves, and who was known to all the world as performing them.”⁹

We have seen that the original ground on which *Bush v.*

¹ (1845) 1 C. B. 578.

³ (1840) 7 Q. B. 960.

⁵ 8 A. & E. 109.

⁷ 12 A. & E. 737.

² Per Cresswell, J., at 593.

⁴ 5 B. & C. 547.

⁶ 6 M. & W. 499.

⁸ 9 M. & W. 710.

⁹ For Scotch cases see *Nisbett v. Dixon* (1852), 14 Dunlop 973; *Cleghorn v. Taylor* (1856), 18 Dunlop 664, commented on in *Campbell v. Kennedy*, 3 Macph. 121, and *Laurent v. Lord Advocate*, 7 Macph. 607.

Steinman was decided—that the person from whom the whole authority is originally derived is the person who ought to be answerable—has, on nearly every occasion on which it has been alluded to, been reflected on.

In *Reedie v. London and North-Western Railway Company*¹ the alternative suggested by Littledale, J., came up for discussion—whether where a man is in possession of fixed property he must take care that his property is so used or managed that other persons are not injured, and that irrespective of whether his property be managed by his own immediate servants or by contractors with them or their servants. A railway company contracted for the construction of a bridge over a highway. The contractor's workmen negligently allowed a stone to fall, which killed a person passing beneath the bridge. Rolfe, B., delivered the considered judgment of the Court of Exchequer—Parke, B. (who had on several occasions expressed approval of Littledale, J.'s, suggested distinction) having been present and taken part in the argument. “On full consideration, we have come to the conclusion that there is no such distinction [*i.e.*, between the liabilities attaching to movable and the liabilities attaching to real property] unless, perhaps, in cases where the act complained of is such as to amount to a nuisance;² and, in fact, that, according to the modern decisions, *Bush v. Steinman* must be taken not to be law, or, at all events, that it cannot be supported on the ground on which the judgment of the Court proceeded.” In some cases it may be that the owner of real property is so responsible. “But then, his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbours, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants. He would have violated the rule of law *sic utere tuo ut alienum non lædas*. This is referred to by Cresswell, J., in delivering the judgment of the Court of Common Bench in *Rich v. Basterfield*,³ as the principle on which parties possessed of fixed property are respon-

*Reedie v.
London and
North-
Western
Railway
Company.*

*Rolfe's, B.'s,
judgment.*

¹ (1849) 4 Ex. 244. See two American cases, *McCullough v. Shoneman*, 105 Pa. St. 169; *Stevens v. Armstrong*, 6 N. Y. 435, and a Canadian case, *Kearney v. Oakes*, 18 Can. S. C. R. 148.

² Per Parke, B., in *Knight v. Fox*, 5 Ex. 721, at 724: “That means a nuisance as connected with a man's house or with his fixed property.” Butt, J., in *The European*, 10 P. D. 99, at 101, seems unconscious that the views of Parke, B., in *Quarman v. Burnett*, have been shaken by subsequent decisions.

³ 4 C. B. 802.

Power of removing contractor's workmen does not render employer liable.

sible for acts of nuisance occasioned by the mode in which property is enjoyed." "The wrongful act here could not in any possible sense be treated as a nuisance. It was one single act of negligence; and in such a case there is no principle for making any distinction by reason of the negligence having arisen in reference to real and not to personal property." A subsidiary point, decided by *Reedie v. London and North-Western Railway Company* should also be noticed. By the contract for the construction of the works the railway company had the power of removing workmen appointed by the contractor, who was yet not considered under their control. We must conclude from the case that a provision of this description does not make the owner of the property responsible for the workman's negligence.

Another proposition involved in *Reedie v. London and North-Western Railway Company* is, that the rule of *Respondeat superior* is applicable only to the immediate superior of the person who does the injury, and that there can be no more than one such responsible superior for the same subordinate at the same time and in respect of the same transaction.¹

Knight v. Fox.

In *Knight v. Fox*,² which followed *Reedie v. London and North-Western Railway Company*, the distinction was sought to be drawn, that the contractor was the servant of the defendants, being paid an annual salary. In the execution of the work, however, out of which the plaintiff's claim arose, the defendants had entered into a distinct contract, by which their general servant had specifically agreed to supply scaffolding for a fixed sum, independent of his general salary. The accident arose from a defect of this scaffold. The Court defined the question for decision to be whether the negligent act by which the injury was occasioned to the plaintiff was done in the capacity of the defendants' servant, or whether the admittedly general servant of the defendants "was acting in the character of a sub-contractor," and "did the work on his own individual account."³ *Overton v. Freeman*⁴ was governed by *Knight v. Fox*, from which the Court said they were unable to distinguish it; and *Peachey v. Rowland*⁵ merely added to the number of authorities. Maule, J.,⁶ in the course of the argument in that case, thus limits his view of the absolute liability of contractors, "If the thing complained of—that is, the

Double capacity—servant and contractor.

Overton v. Freeman.

Peachey v. Rowland.

¹ *Ante*, 727.

² (1850) 5 Ex. 721.

³ Per Alderson, B., at 725.

⁴ (1851) 11 C. B. 867.

⁵ (1853) 13 C. B. 182, at 185. The marginal note in this report states the principle of the decision too generally; per Lord Campbell, *Sadler v. Henlock*, 4 E. & B. 570, at 573.

⁶ L. c. at 185.

work which the defendants procured to be done—could not be done otherwise than in an unlawful manner, no doubt they would be responsible for the consequences.”

The soundness of this limitation was questioned in *Ellis v. Sheffield Gas Consumers' Company*.¹ Defendants made a contract to break open streets for the purpose of laying gas-pipes. There being no legal excuse for breaking open the streets, the work involved creating a public nuisance. An accident having happened, the objection was taken that the cause was the negligence of the servants of the contractors. To this Lord Campbell said: “Mr. Jones argues for a proposition absolutely untenable, namely, that in no case can a man be responsible for the act of a person with whom he has made a contract. I am clearly of opinion that if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself. I perfectly approve of the cases which have been cited.² In those cases the contractor was employed to do a thing perfectly lawful: the relation of master and servant did not subsist between the employer and those actually doing the work; and therefore the employer was not liable for their negligence. He was not answerable for anything beyond what he employed the contractor to do, and, that being lawful, he was not liable at all. But in the present case the defendants had no right to break up the streets at all.” “It would be monstrous if the party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done.” The rest of the Court concurred.³

Where the work cannot be done otherwise than in an unlawful manner.

Ellis v. Sheffield Gas Consumers' Company.

In *Gayford v. Nicholls*⁴ the defendant contracted with a builder to erect buildings on the border of his land, which abutted on land and certain modern buildings of the plaintiff. In doing the work the plaintiff's wall was thrown down, and bricks and other material fell upon defendant's land and were carted away by the contractor's workmen. The County Court judge at the trial said: “If ‘the jury should be of opinion that the workmen whilst they were on the land by the defendant's permission, had from want of due care injured the plaintiff's property, or had

Gayford v. Nicholls.

¹ (1853) 2 E. & B. 767. The same point is decided in *Congreve v. Morgan*, 5 Duer (N. Y.) 405, affirmed *sub nom.* *Congreve v. Smith*, 18 N. Y. 79. See *ante*, 493.

² *Knight v. Fox*; *Overton v. Freeman*; *Peachey v. Rowland*.

³ The Canadian case of *Walker v. McMillan* (1882), 6 Can. S. C. R. 241, is on a similar point. Defendant was there held liable for his contractor's act because the work executed was itself illegal. Gwynne, J., however, dissented in a most elaborate judgment, where both the English and American authority on the point is most ably and fully passed in review.

⁴ (1854) 9 Ex. 702.

⁵ See per Parke, B., at 708.

carried away the plaintiff's materials, the defendant would be liable for those acts." This was held a misdirection. Parke, B., said: "I am clearly of opinion that no action would lie against him unless *he* carried away the materials himself, or unless that was done by some servant authorised by him to do so as his servant."

Sadler v.
Henlock.

An attempt was made in *Sadler v. Henlock*¹ to carry the reasoning applicable to independent employment to an extreme by treating as a contractor a common labourer employed for five shillings to clean out a ditch. Lord Campbell, C.J., points out;² "The defendant might have said, 'Fill up the hole in the road, but not as you are now doing it, lest when a horse goes over the place he may be injured.' Pearson was therefore the defendant's servant, and if so *cadit quæstio*." The practical effect of this decision—though this is not absolutely expressed—is, that the whole circumstances of the employment must be looked to, and that the real effect of the actual relation existing must not be lost sight of, by seizing on the circumstance of a special payment or a special term, such as a provision for supervision or for dismissal, that does not go to the root of the relation.³ In short, as Crompton, J., put it, the question is,⁴ "Whether the defendant retained the power of controlling the work?"

Steel v. South-
Eastern
Railway.

*Steel v. South-Eastern Railway Company*⁵ may serve as another illustration of the principle. The work being done under a contract and no negligence being shewn, the fact that the defendants' surveyor directed the thing to be done was treated as an immaterial circumstance, there being a contract regulating what was done.

Hired plant
or material.

There is no liability on the part of the owner where plant or material has been hired (and with it the men who have charge of

¹ (1855) 4 E. & B. 570. See *Martin v. Temperley*, 4 Q. B. 298, at 312: "It is said that a difference arises where the workman is paid so much for doing the whole job. But the defendant might pay either for a given time or a given work; and the men here were as much under the defendant's control as a gentleman's coachman is under that of his master." Cp. *Donovan v. Laing Wharton, and Down Construction Syndicate* (1893), 1 Q. B. 629, and the American cases, *Hexamer v. Webb*, 101 N. Y. 377; *Linehan v. Rollins*, 137 Mass. 123.

² 4 E. & B. at 577.

³ As was said in *Cuff v. Newark and New York Railway Company*, 6 Vroom (N.J.) 17, cited in Bigelow, L. C. on Torts, 654: "The point of inquiry was not under what circumstances was the owner, who lets the particular contract, exempt from liability for the negligence of the employees of the contractor. The question of liability depended upon the relation of master and servant, incident to which was the power to select the servant, direct him in the performance of his work, and to discharge him when found incompetent; and also the duty to so control his acts that no injury might be done to third persons."

⁴ 4 E. & B. at 578.

⁵ (1855) 16 C. B. 550. The head-note of this case is incorrect. The ground of the decision is that if the direction given by the company's superintendent had been obeyed by the contractor's men, the damage complained of would not have occurred: see per Jervis, C.J., at 552.

the working while in the use of the owner), when an injury occurs through negligence while in charge of the hirer;¹ and it has been decided, and is self-evident, that where such an accident occurs and the owner's men have not ascertained for themselves the safety of a direction given to them in the course of the work, by the person entrusted with the duty of giving, or abstaining from giving, the order, there is no liability on the owner; since the giver of the order has the duty of seeing to the propriety of it.²

The duty of an employer to third persons is discharged, where (1) the work which he has let out is not dangerous, or rather where the danger in the work does not arise from the thing contracted to be done; and (2) the contractor employed is an ordinarily careful and skilful man. So that, in causing a building to be put up, an employer is not liable for accidents happening in the ordinary course of the work if in employing a builder he selects him with such care as an ordinary careful man would use; and he is not affected by any careless and improper conduct of the builder of which he has not notice.³

The result of the cases and the general principles on which they go have been well stated by Lord Gifford in the Scotch Court of Session.⁴ He says: "On carefully considering the very numerous cases which have occurred, chiefly in England, on this branch of the law, and of which we had in argument a very full citation, I think that the principle which governs the decision in such cases is that the principal or superior, be he called either master or employer, who has reserved or who has assumed the direct and personal control over the subordinate, be he called servant or workman, who committed the fault or negligence, is liable to the damage thereby caused. In such case, *Respondeat superior*; the superior is answerable for the negligence of his subordinate; and the test, I think, always is, had the superior personal control or power over the acting or mode of acting of the subordinate? I use the expression 'personal control,' because I think that this is always the turning-point in such cases. Was there a control or direction of the person in opposition to a mere right to object to the quality or description of the work done? Where this element of personal control is found, then responsibility, either for malfeasance or nonfeasance, for fault or

Duty of employer to third persons where work is done under a contract.

Result of the cases as stated by Lord Gifford in the Court of Session.

¹ (1870) *Donovan v. Laing, Wharton and Down Construction Syndicate* (1893), 1 Q. B. 629; *Oldfield v. Furness, Withy & Co.*, 9 Times L. R. 515 (C. A.); *Murray v. Currie*, L. R. 6 C. P. 24; *Wallis v. Hine*, 4 Times L. R. 472 (C. A.).

² *Wilson v. Caledonian Railway Company*, 24 Sc. L. R. 541.

³ *Searle v. Laverick*, L. R. 9 Q. B. 122, at 124. *Ante*, 493.

⁴ (1876) *Stephen v. Thurso Police Commissioners*, 3 Rettie 535, at 542.

negligence, will attach, not only to the servant or workman (he is always liable), but to him who had the personal control over him—who was his superior in the sense of the maxim. On the other hand, if an employer has no such personal control, but has merely the right to reject work that is ill done or to stop work that is not being rightly done, but has no power over the person or time of the workman or artisan employed, then he will not be their superior in the sense of the maxim, and not answerable for their fault or negligence.”

Rule in the
United States
same.

The rule in the United States is the same. Where work, not necessarily a nuisance, is let by an employer who merely indicates the end to another who undertakes to attain it, the latter is alone responsible for the means he uses. If in the course of the work a third person sustains injury by the negligent conduct of the work, the employer is not answerable. The inquiry in the case is, Did the relation of master and servant subsist between the person for whom the work was done and the person whose negligence occasioned the injury? If, in doing the work, the negligent person is in course of accomplishing a given end for his employer, over which the latter has no control, and which is subject to the exclusive control of the person employed, then such person is exercising an independent employment and the employer is not liable. If, on the other hand, the end to be accomplished is unlawful, or if in and of itself it necessarily results in the creation of a nuisance or the making a place dangerous which the employer is under a peculiar obligation to keep secure, then, regardless of the relation which exists between the employer and the person whose negligent conduct causes the injury, the employer is liable for breach of duty.¹

Negligent
execution of
works not
dangerous.

Even where the work contracted to be done is not in the nature of a nuisance, if the execution of it is negligent and results in damage to a neighbour which manifests itself after the completion of the work by the contractor and its delivery over to the employer, the employer is liable to the person injured in respect of such damage, though he has his remedy over against the contractor for breach of the contract to do the work with reasonable care and skill. Thus, where a plumber did work negligently, and four years after its completion a house, below that in which the work was done, was flooded, and the cause was clearly traced to the imperfect plumbing work, the owner, though compelled to pay compensation in respect of the damage, was

¹ See *Wabash, &c. Railroad Company v. Farver*, 60 Am. R. 696, and the long list of cases therein cited; also see *Casement v. Brown*, 148 U. S. (41 Davis) 615. The duty of a contractor to guard against danger exists only so long as he continues at work on the premises, *Milne v. Smith*, 2 Dow (H. L.) 390.

held entitled to recover what he paid from the contractor, to whose negligent work the origin of the damage was traced.¹

The distinction between the liability of one who contracts to do a thing, and that of one who merely receives a delegation of authority to act for another, is fundamental. If an agency is an undertaking to do the business, and the contract looks mainly to the thing to be done, and is for the due use of all proper means of performance, the responsibility of the agent extends to all necessary and proper means to accomplish the object by whomsoever used. But if the agency is no more than a delegation of authority to act for another, and provides only for the immediate services of the agent and for his faithful conduct as representing his principal, the responsibility of the agent ceases with the limit of the personal services undertaken.² It has also been decided that a stipulation that work shall be done to the satisfaction of the employer's engineer is not evidence of such an assumption of a right to control the details and method of doing work as will render the principal liable for the negligent way of doing the work by the sub-contractor or his servant.³

¹ (1883) *M'Intyre v. Gallacher*, 11 Rettie 64.

² *Exchange National Bank v. Third National Bank*, 112 U. S. (5 Davis) 276, at 289, 290. For a collection of the cases on the principle that for the acts of a sub-agent the principal is liable, but for the acts of the agent of an independent contractor he is not liable, see Story on Agency, § 454.

³ *Powell v. Construction Company*, 17 Am. St. R. 925.

CHAPTER IV.

MASTER'S DUTY TO HIS SERVANT.

Master's liability to his servant not based on any peculiar principle.

It is often said that the liability of the master for accident happening to his servant has been treated on too narrow a basis. Liability, however, in this case is not due to principles peculiar to the relation of master and servant so much as to the application of the general governing principles of law, that where fault is there is liability, *culpa tenet suos auctores tantum*, and that in the absence of fault there is, *primâ facie* at any rate, an absence of liability.

Constructive fault.

The law, it is true, in some cases fixes a sort of constructive fault which carries with it liability even where, directly and immediately at least, there is no imputation of blame. Nevertheless the broad rule is that unless fault is shewn there is no liability, and that loss lies where it falls. For example, the duties of an owner of fixed property, in respect of the condition of that property, arise out of general principles that govern all legal relationships, and not out of a contract or any special relation with the person injured. So, too, when we turn from the consideration of those general duties, which the possession of property raise with regard to others, to those more special duties which the law casts on masters with regard to the safety of their servants, while working upon premises, or with machinery, we see that the latter are only a class of duties, considered more in detail, or on which more attention is concentrated as more frequently arising, yet still falling under the more general principle which governs the master's relations to the world at large that where fault is there is liability.

View that the master's liability arises from the terms of the contract as made with the servant.

A common view is, that the liability of the master arises from the contract made with the servant; but the *contract* is evidenced by the terms of it, and the terms of providing against danger or accident seldom, if ever, appear. Then it is contended, that the requisite *terms* to effect the object in view are implied. But why? in what way? And, if implied, why is not every duty

from the master to the servant implied? Such a method of interpretation will extend the law of contracts indefinitely—almost universally—and will also cause needless and unsatisfactory complications in what is, after all, a very simple matter. The master is liable to the servant in the terms of the contract; and further, he is liable in respect of those occurrences which take their rise from the existence of the contract just as if no contract existed and the rights of the parties were regulated by the general rules of the common law.

For example, as regards the liability of the master for his personal negligence, or for the condition of premises or machinery, it is comprehended in the few simple principles that regulate his liability with regard to the outside world. The master is liable for personal negligence whereby hurt is caused to his servant; so is one servant liable for injury caused to another servant; so is the master for his own personal negligence to the world at large. The master further is liable when he knows, or should know, that his premises or machinery are unsafe, and when the servant is ignorant of the fact;¹ so is the master to the outside world when an accident happens from their having business relations with him. In short, the duty which the master owes the servant is just the same that he owes to every other person with whom he has business relations; he must not conceal from him dangerous circumstances which, if known, might cause him to alter his position, nor personally be negligent in any respect.

For damage caused by the ordinary risks of the employment the master is not liable. First, because there is no fault of the master; second, because the risk arises out of the very thing to be done—the coming in contact with agencies that may be dangerous and men who may be negligent, with respect to which the master can exercise no absolutely protective power, or does not specifically contract to do so; third, because workmen undertaking a work must be supposed to have a prevision of its ordinary risks as well as of its labours, and as they secure by their engagements remuneration for the one, they must be held to secure insurance in their wages against the other. Or, to state the matter more briefly, there are two presumptions made in actions arising out of alleged breach of duty by the master to the servant in the circumstances of his work. First, that the master has discharged his duty by providing suitable appliances for the business. Second, that the servant has assumed all the usual and ordinary hazards of the business. And till one of these at least is dis-

Master's duty the same as that which he has to the world generally,

but not liable to the servant for damage caused by the ordinary risks of the employment.

¹ Griffiths v. London and St. Katharine Docks Company, 13 Q. B. Div. 259; Groves v. Fuller, 4 Times L. R. 474.

placed by evidence an action cannot be maintained by a servant against a master for injury suffered in the course of his employment;¹ that is, such an action cannot be maintained at common law and independent of statutory modification. Bearing in mind these cautions, then, we have now to consider those cases which work out the duty owing to the servant by the master in respect (1) of the dangerous condition of property, machinery, or tools, and (2) of his own personal negligence.

I. Duty owing by the master to the servant in respect of the dangerous condition of property, machinery, or tools.

Paterson v. Wallace.

Two propositions to be established to fix liability.

Paterson v. Wallace discussed.

I. THE DUTY OWING TO THE SERVANT BY THE MASTER IN RESPECT OF THE DANGEROUS CONDITION OF PROPERTY, MACHINERY, OR TOOLS.

Two Scotch cases in the House of Lords, *Paterson v. Wallace*,² and *Brydon v. Stewart*,³ first authoritatively elucidate this principle. In *Paterson v. Wallace*, where the case was withdrawn from the jury, the cause of action was that the husband of the pursuer had lost his life by reason of the masters' negligence, in having carelessly left a large stone on the roof of a mine in so dangerous a position that it fell on the workman while engaged in digging out coal, and killed him.

The House of Lords held that two propositions must be established to enable the pursuer to succeed; and that these must be submitted to a jury to find affirmatively. They are: first, that the stone was dangerous owing to the negligence of the master; secondly, that the workman whose life was forfeited lost it by reason of that negligence, and not by reason of rashness on his own part.

As to the first point. It is good law, said Lord Cranworth, C.,⁴ "that if the defenders' manager had failed in his duty in timeously directing the stone in question to be removed it would afford no defence that Paterson [the deceased] continued to work after the orders for the removal of the stone had been ultimately given."

The decision of the House of Lords turned entirely on the fact that the case had been withdrawn from the jury by the Lord

¹ See Wood, Master and Servant, § 368.

² (1854) 1 Macq. (H. L. Sc.) 748. In *Vose v. Lancashire and Yorkshire Railway Company*, 2 H. & N. 728, at 732, Pollock, C.B., commenting on Lord Cranworth's statement: "It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure, when in fact the master knows, or ought to know, that it is not so; and if from any negligence in this respect damage arises, the master is responsible"—says: "That is merely the *dictum* of the Lord Chancellor in a Scotch case, not a decision of the House of Lords." The law has, however, long been so established.

³ 2 Macq. (H. L. Sc.) 30.

⁴ 1 Macq. (H. L. Sc.) 748 at 757.

Ordinary, who himself decided the fact against the pursuers, that the death was occasioned by the workman's own rashness. The House, while by no means indicating what the effect of the findings on the facts might be, pointed out that the case was not to be disposed of without findings by the jury, and indicated the issues to be submitted to them. In the course of the argument, Lord Brougham remarked: "Workmen in mines are proverbially reckless. This makes it incumbent on the masters of such men to be more than ordinary careful." This expression of the duty owing by the master was probably based on the opinion of the Lord Justice-Clerk Hope, who in the Court below said: "We have had occasion to lay down the doctrine that mere rashness on the part of the workmen would not exclude a claim of reparation if the employer had neglected his duty."¹ In moving the judgment of the House the Lord Chancellor says: "It is said that by the law of Scotland the master is bound to provide against the rashness of his workmen; and I see in one of the learned judges' opinions an expression which might give countenance to such a notion. But with great deference to that learned judge, I apprehend the proposition is one which, as matter of law, can never be sustained. In England, in Scotland, and in every civilized country, a party who rashly rushes into danger himself, and thereby sustains damage, cannot say to the master, 'This is owing to *your* negligence.' As a question of fact it may very well be laid down that that which would be reasonably treated as rashness in other persons might not be treated as rashness in a workman, if the master knew that the rashness was of a kind which workmen ordinarily exhibit; and that, perhaps, was all the learned judge meant."

Dictum of Lord Brougham.

Some expressions dropped in this case have been alleged as tending to invalidate the rule first laid down in *Priestley v. Fowler*;² and in *Potts v. Plunkett*,³ Lefroy, C.J., is reported as saying: "The decision in that case [*Paterson v. Wallace*] did not rest upon any supposed warranty on the part of the employer, but upon the fact that the employer virtually knew and was aware of the cause by which the mischief which occurred was occasioned; because the person to whom he had delegated the superintendence of the mine was called upon and warned, by the persons employed in the mine, of the danger to which they were exposed from the stone overhanging their heads, the fall of which ultimately occasioned the accident which happened."

*Lefroy, C.J.,
in Potts v.
Plunkett.*

¹ Referred to in a note to 1 Macq. (H. L. Sc.) 753.

² 3 M. & W. 1.

³ 9 Ir. C. L. R. 290, at 299.

. . . . The superintendent, however, disregarding that warning, compelled the men under him to go on with the work; and as the master is liable, as a matter of course, for the acts and defaults of those whom he places in his stead, and to whom he deposes his authority, in that case the master was properly held liable."

Criticized.

This is manifestly an inaccurate statement of the law; for had the superintendent been negligent, the negligence would have been that of a fellow-servant within the rule, and the employer would not have been liable; and further, the authority of *Priestley v. Fowler*, though saved by the interpretation of the C.J. from destruction in one way, would to a great extent have perished through the interpretation that was to have saved it.¹

Ground of decision in *Paterson v. Wallace*.

The real ground on which *Paterson v. Wallace* was decided is much better stated in the argument than in the judgment in *Potts v. Plunkett*. In *Paterson v. Wallace* the employers *ought* to have known that the condition of the works was insecure; for the jury found the death was occasioned by the unsafe state of the roof of the mine, and the negligence or unskilfulness of the owners in having left it so when the workmen were sent to work there. Had there not been the finding of the jury, the case might have been considered to conflict with certain aspects of *Priestley v. Fowler*. The finding of the jury brought it under the limitation of that rule which excepts matters in which the employer has a personal responsibility. The master is not liable for the negligence of his superintendent; nevertheless he is bound to see that his works are suitable for the operations he carries on at them being carried on with reasonable safety. If the master leaves the supervision of his works to his superintendent, the master cannot by doing so escape liability: for the duty is one of which he cannot divest himself. If the superintendent is negligent the master is not answerable; yet if the appliances with which the men have to work are not reasonably suitable, the neglect is the master's.

Paterson v. Wallace compared with *Ball v. Johnson*.

The decision in *Paterson v. Wallace* may be better appreciated by comparing it with *Hall v. Johnson*² in the Exchequer Chamber. The facts are almost identical. The second count of the declaration set out that the defendants neglected to see that "the person by them employed to see that the roof of the mine was made secure for the safety of the plaintiff should be a fit person to be so employed." As to this the judgment of the Exchequer Chamber³ was, that there was no evidence of such

¹ See *Wilson v. Merry*, L. R. 1 Sc. App. 326.

² 3 H. & C. 589.

³ Delivered by Erle, C.J.

neglect, and that the fact that the person chosen was negligent was not sufficient, since it was only the negligence of a fellow-servant, which did not import liability. There was also a count—and it is in this that the likeness to *Paterson v. Wallace* consists—setting out that “the plaintiff was employed by the defendants to work for them in an underground passage in a coal mine which the defendants possessed, which passage was dangerous and unsafe for the plaintiff to work in, on account of the roof of the passage being liable to fall down upon him while he was so working, unless reasonable and proper care and precautions were taken by the defendants to prevent such roof from falling, of all which premises the defendants had notice and knowledge.” The evidence did not sustain this, as it shewed that “the mine had been worked in the ordinary course for the last six years.”¹ The distinction between the two cases is thus clear. In *Paterson v. Wallace*, there was a question for the jury whether the master had been personally negligent in respect to the condition of the works, raised by the presence of facts that were consistent with negligence; in *Hall v. Johnson*, from the admitted facts, the master could not be presumed to be personally negligent, for “the mine had been worked in the ordinary course for the last six years.” The negligence proved was the negligence of a workman not shewn to be incompetent; therefore the employer was not liable. It is true that in *Paterson v. Wallace*, as in all the earlier cases, expressions occur which must be referred to the very indeterminate notions prevalent as to the responsibility of the employer for the negligence of a superintendent (this is true also of *Hall v. Johnson* itself); but the real ground of decision is, that there was an allegation of the personal negligence of the master, and facts that required to be determined by a jury in the one case, while in *Hall v. Johnson* no such facts existed, or were offered to be proved.

The second case, *Brydon v. Stewart*,² raised the point whether a master is reponsible for defective machinery occasioning injury to workmen while pursuing their own affairs and apart from

¹ Per Erle, C.J., 3 H. & C. at 594.

² (1855) 2 Macq. (H. L. Sc.) 30. Cp. *Tunney v. Midland Railway Company*, L. R. 1 C. P. 291. Plaintiff was returning from work in a “pick-up train” when injured. Held, that he was injured while in the service of his employer, “for it was part of his contract that he was to be carried by the train to and from the place where his work happened to be.” The same point is raised by two American cases, *Gilshannon v. Stony Brook Railroad Corporation*, 64 Mass. 228, and *Russell v. Hudson River Company*, 5 Duer. (N. Y.) 39. The former of these is consistent, the latter inconsistent, with the English case. In *O'Donnell v. Allegheny Valley Railroad Company*, 59 Pa. St. 239, the principle was formulated that the workman has the rights of a passenger if he gives consideration for his carriage. Cp. *Rohl v. Metropolitan Railway Company*, 7 Times L. R. 2.

the work for which they are engaged by him. Men were leaving a mine, without working, from no apprehension of danger, and of their own accord, for a purpose of their own, against their employer's interest, and in a body, in order to make some complaint tell more effectually with the manager of the defendant, and not in the course of their ordinary occupation; while they were leaving the accident happened. The House of Lords decided that the master who let the men down was bound to bring them up, even if they come up for their own business and not for his, and is answerable for the state of his tackle. Any other decision seems impossible. The duty of the master is to provide suitable appliances so that the men in his employment are not exposed to unnecessary danger. If he has discharged his obligation there is no liability. If he has not discharged his obligation, the fact of actual working or the state of the men's intentions or the precise direction in which they are going is clearly immaterial. In contemplation of law, they are where they are in reliance on the master's performance of his duty to them, which is antecedent to and independent of their performance of their duty to him. The dilemma seems to be, if they were workmen, the master was bound to supply suitable appliances for them; if they were not workmen, he was bound to take care, so long as they were on his premises by his invitation, that they were not exposed to injury by his neglect.

Principle
stated.

The principle established by these cases is that when a master employs his servant in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks,¹ or as the law was expressed by Lord Wensleydale in another Scotch case in the House of Lords: "All that the master is bound to do is to provide machinery fit and proper for the work, and to take care to have it superintended by himself or his workmen in a fit and proper manner."

Obligation of
master as to
condition of
work in course
of construction.

The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not oblige him, as towards them, to keep the work, which they are actually engaged in constructing, in a safe condition through all its stages and at

¹ *Bartonsbill Coal Company v. Reid*, 3 Macq. (H.L. Sc.) 266, per Lord Cranworth, at 288. Byles, J., in *Searle v. Lindsay*, 11 C. B. N. S. 429, at 439, after quoting the sentence in the text, adds: "That is the extent of the master's responsibility. The obligation the law casts upon him is to take due and proper care that his machinery is sufficient and his workmen reasonably competent." Cp. *Cairns v. Caledonian Railway Company*, 16 Rettie 618.

² *Weems v. Mathieson*, 4 Macq. (H.L. Sc.) 215, at 227; *M'Kinney v. Irish North-Western Railway Company*, Ir. R. 2 C. L. 600, on demurrer in Irish Ex. Ch.

every moment of their work.¹ Neither is he bound to furnish the completest possible sets of tools or appliances. When he has furnished his workmen "with tools and appliances, which though not the best possible may, by ordinary care, be used without danger, he has discharged his duty and is not responsible for accidents."² In another case it is said: "The test is general use,"³ and in a still later case,⁴ the employer's duty was limited to providing machinery, "such as is ordinarily used by persons in the same business and such as can with reasonable care be used without danger to the employé"; which if done, "is all that is required of the employer and is the limit of his responsibility." And again,⁵ employers are "bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter."

The case of *Seymour v. Maddox*⁶ turned more on a point of pleading than of law. The relation between plaintiff and defendant was that of master and servant; facts were alleged which did

Seymour v. Maddox.

¹ *Armour v. Hahn*, 111 U.S. (4 Davis), 313, at 318. Cp. *Howe v. Finch*, 17 Q. B. D. 187; *Brannigan v. Robinson* (1892), 1 Q. B. 344, the work at which the man was engaged through which the injury was sustained was independent of the work of pulling down the wall, and *post*, 844.

² *Pittsburgh, &c. Railroad Company v. Sentmeyer*, 92 Pa. St. 276. 37 R. 684

³ *Iron Shipbuilding Works v. Nuttall*, 119 Pa. St. 149, at 158. In the Court of first instance it was said: "It is a proposition of law that the owner or employer must furnish tools and machinery reasonably safe and adequate for the purpose of performing the work required of them. He is not required to adopt every new idea of safety; he is not even required to adopt the very best and safest machinery, for that would break up almost every establishment in the country. Everywhere new improvements are constantly being made; new safeguards invented. When they become generally used, when they are generally adopted, then it is the duty of the employer to use them; but until the adoption of the machine becomes common, until the new safeguards become general, until they are in general use to a certain extent, so general as to convey notice to the man using such a machine, they are not required to adopt every new safeguard."

⁴ *Lehigh, &c. Coal Company v. Hayes*, 128 Pa. St. 294, 15 Am. St. R. 680.

⁵ *Washington, &c. Railroad Company v. McDade*, 135 U. S. (28 Davis) 554.

⁶ 16 Q. B. 326. This case is questioned in *Ryan v. Fowler*, 24 N. Y. 410, and followed in *Murphy v. New York Central Railroad Company*, 11 Daly (N. Y.) 122. Cp. *Williams v. Clough*, 3 H. & N. 258; *Griffiths v. London and St. Katharine Docks Company*, 12 Q. B. D. 493, 13 Q. B. Div. 259. "I conceive that a party cannot merely, by putting into a record a statement that a duty lay upon the defender, compel the Court to grant him a jury trial. The question whether a duty exists or not may sometimes be a mere question of fact, but in general it is not simply a question of fact. A duty arises either out of the relation of parties, or out of express paction, or other special circumstances; and in order to make a relevant allegation of duty the foundation of it must be set forth. It is easy to say that a duty existed: but that allegation will be of no avail unless the grounds on which it rests are relevantly avowed": per Lord Neaves, *Robertson v. Adamson*, 24 Dunlop 1231, at 1234; *M'Neill v. Wallace*, 15 Dunlop 818. In *Davies v. England*, 33 L. J. Q. B. 321, the first count of the declaration setting out that it "was the defendant's duty to take care that healthy and sound beasts were supplied," was held bad, as alleging a duty without setting out facts that raised the duty. The case of *Brown v. Mallett*, 5 C. B. 599, is an authority that the allegation of duty in a declaration is immaterial, inasmuch as the duty will be raised or not by the acts which are there stated: per Williams, J., *White v. Phillips*, 33 L. J. C. P. 33, at 37. As to duties inferred by law see *M'Kinney v. Irish North-Western Railway Company*, Ir. R. 2 C. L. 600.

not raise a duty where that relation existed; facts, however, might have been alleged which, possibly, would have raised a duty. It was held that a general allegation of duty is insufficient to let in evidence of facts not set out in the declaration; and on those facts that were, a cause of action was not shewn. No rule of law was laid down; though, by implication, an absolute duty on the master to supply machinery in all respects fit, without regard to the workman's knowledge or acquiescence is negatived. Had the declaration averred a concealed danger, it would probably have been held good; so, too, had it alleged a negligent or dangerous state of things, known to the master, and which the servant neither knew nor had the means of knowing; all it actually did was to allege facts, all of which, from anything that appeared, were in the knowledge of the plaintiff, and with reference to which he may have accepted his employment; thus the plaintiff failed to discharge the *onus* upon him of averring actionable facts.

II. Duty owing to the servant by the master in respect of his own personal negligence.

II. THE DUTY OWING TO THE SERVANT BY THE MASTER IN RESPECT OF HIS OWN PERSONAL NEGLIGENCE.

This duty is threefold: to take care (1) in providing proper materials; (2) in providing efficient fellow-servants;¹ and (3) to avoid any negligence whereby injury is occasioned to the servant when the master is himself working with the servants.²

Principle stated by Crompton, J., in *Ashworth v. Stanwix*.

The principle is laid down by Crompton, J., giving judgment in *Ashworth v. Stanwix*:³ "It has never been doubted that for personal negligence of the master, whereby injury is occasioned to the servant, the master will be liable."⁴ And in the subsequent case of *Mellors v. Shaw*⁵ the same judge quotes and confirms certain observations made by himself in *Ormond v. Holland*:⁶

¹ *Roberts v. Smith*, 2 H. & N. 213; *Hough v. Texas, &c. Railway Company*, 100 U. S. (10 Otto) 213.

² *Ashworth v. Stanwix*, 3 E. & E. 701. This case was distinguished in *Drew v. East Whitby*, 46 Upp. Can. Q. B. 107. In Scotland the same proposition as in *Ashworth v. Stanwix* was laid down in *Finnighan v. Peters*, 23 Dunlop 260. As to unreasonable risks, see *Warren v. Wildie*, W. N. 1872, 87, also reported as a note to *Fowler v. Lock*, 41 L. J. C. P. 104, where a servant was injured by an explosion of gas caused by the master's negligence.

³ 3 E. & E. at 708. "For his own personal negligence a master was always liable, and still is liable, at common law, both to his own workmen and to the general public who come upon his premises at his invitation on business in which he is concerned:" per Bowen, L.J., *Thomas v. Quartermaine*, 18 Q. B. Div. 685, at 691. Where the director of a company gave directions to the superintendent of works to have defective machinery repaired before recommencing operations, but the superintendent neglected to carry them out, and the repairs were not made, it was held that the director's intervention was not such as to take the case out of the general rule of law as to the non-liability of the employer for accidents due to the negligence of a fellow-workman. *Matthews v. Hamilton Powder Company*, 14 Out. App. 261.

⁴ 1 B. & S. 437, at 444.

⁵ E. B. & E. 102, at 106.

"The master is not liable unless there be personal negligence on his part, which negligence may be either in personally interfering in the work, or selecting the servants who do interfere." He subsequently adds: "I think it is negligence for which the master is liable, if he knows that the machinery or tackle to be used by the persons employed by him is improper and unsafe, and notwithstanding that knowledge sanctions its use."¹

It follows that if the negligence of the master combines with the negligence of a fellow-servant, and the two contribute to the injury, the servant injured may recover damages against the master.²

Negligence of master combining with negligence of fellow-servant.

The general principle being as stated, there have been two limitations engrafted upon it, under which the servant is disentitled to recover. First, if he have the same means of knowledge of the danger or inefficiency of machinery as the master;³ and secondly, if he contracts to work under conditions of greater risk than those ordinarily attaching to the employment. Whether he has contracted to do this may be shewn either by antecedent agreement, or inferred from subsequent conduct.

Two exceptions to the general principle.

*Skipp v. Eastern Counties Railway Company*⁴ is a case which may be ranked under the latter heading. The company's staff was insufficient; nevertheless the plaintiff had been engaged for three months, and had never complained till he was injured. The Court refused to allow the question to go to a jury of how many servants a railway company should employ. Any one contracting with them, and continuing without complaint in their employment, is not entitled when injured to turn round and bring his action. "If he found that he could not do the work that was set him, he ought to have declined it in the first

Skipp v. Eastern Counties Railway.

¹ Cp. *Coombs v. New Bedford Cordage Company*, 102 Mass. 572, at 596, per Gray, J., recognising the general principles "that an employer is under an implied contract with his servant to find suitable instruments and means of carrying on the business, and a suitable place in which the servant himself, exercising due care, may perform his duty without exposure to dangers, not coming within the obvious scope of his employment; and that the implied contract to have the machinery in such a safe and proper condition as not to expose the servant to unnecessary risk, is the foundation of the master's liability." *Coombs's* case is distinguished in *Ciriack v. Merchants' Woollen Company*, 146 Mass. 182, 4 Am. St. R. 307. "The risk of the safety of machinery is not assumed by an employé unless he knows the danger, or unless it is so obvious that he will be presumed to know it. He takes the risk of known or obvious dangers and not of others." *Myers v. Hudson Iron Company*, 150 Mass. 125, at 134. See also a very forcibly expressed judgment to the same effect, *Kean v. Detroit Rolling Mills*, 11 Am. St. R. 492. *Holmes v. Clarke*, 6 H. & N. 349, 7 H. & N. 937, is an authority for the liability of the master for personal negligence. This obligation, however, does not import a warranty. See per Byles, J., *Searle v. Lindsay*, 11 C. B. N. S. 429, at 439.

² *Grand Trunk of Canada v. Cummings*, 106 U. S. (16 Otto) 700, *ante*, 87.

³ *Potts v. Plunkett*, 9 Ir. C. L. R. 290, at 298.

⁴ (1853) 9 Ex. 223; *Northern Pacific Railroad Company v. Herbert*, 116 U. S. (9 Davis) 642. "If it were negligence to direct a man to do work more or less dangerous, it would be impossible to do such work:" per Lord Coleridge, C.J., *Booker v. Higgs*, 3 Times L. R. 618.

3 R 506

Principle as
stated by
Pollock, C.B.

rule was more shortly expressed by Pollock, C.B., during the argument: "A servant cannot continue to use a machine he knows to be dangerous at the risk of his employer."¹ The distinction, between cases like *Paterson v. Wallace*² and the present case, was pointed out to be that in the Scotch case the workman was injured by the fall of a stone with which he had nothing to do, while in the present case the injury was caused by the very machinery with which it was the deceased's duty to work, and on which he was actually employed at the time of the accident, the actual occurrence of which was not shewn not to be inconsistent with his personal negligence in the very matter. More recent cases³ are inconsistent with *Dynen v. Leach* in so far as the decision affirms a power in the judge to nonsuit in such a case, though the distinction taken between *Dynen v. Leach* and *Paterson v. Wallace*, expresses a clear distinction between the former case and the decision of the House of Lords in *Smith v. Baker*. Whether continued working in circumstances of danger amounts to an acceptance of the risk or not, is, however, now settled to be a question of fact that must not be withdrawn from the jury.

Willes, J., in
Saxton v.
Hawkesworth.

Subsequently to *Dynen v. Leach*, in *Saxton v. Hawkesworth* in the Exchequer Chamber, Willes, J.,⁴ laid down the law in the following terms: "A master is not justified in exposing his servant to any risk or danger of which the servant is ignorant, and if the servant chooses to enter into his employ without knowing of the risk, which is known to the master and not to the servant, and the servant suffers accordingly, then a consideration arises like that in the case in the Court of Common Pleas,⁵ where a person employed another to carry a carboy of nitric acid, and, in the course of carriage, the latter tripped and fell, and was injured by the acid. The Court thought the employer was answerable because, knowing the danger, he ought to have informed the person who was carrying the carboy of its dangerous character. But if a servant enters into an employment knowing there is

decided by it. There was no evidence that the machinery used was improper, and it was consistent with the facts that the workman's own negligence caused his death." Cp. *Gurling v. Hurst*, 6 Times L. R. 94; *Coombs v. New Bedford Cordage Company*, 102 Mass. 583; *Wheeler v. Wason Manufacturing Company*, 135 Mass. 294.

¹ On the same principle see *Assop v. Yates*, 2 H. & N. 768; *Griffiths v. Gidlow*, 3 H. & N. 648; *Kain v. Smith*, 89 N. Y. 375; *Wannamaker v. Burke*, 111 Pa. St. 423.

² 1 Macq. (H. L. Sc.) 748.

³ E.g., *Thomas v. Quartermaine*, 18 Q. B. Div. 685, at 697; *Smith v. Baker* (1891), App. Cas. 325, at 335.

⁴ (1872) 26 L. T. (N. S.) 851, at 853. Cp. *Cowley v. Mayor, &c., of Sunderland*, 6 H. & N. 565, which decides that apart from the relation of master and servant, where the danger is one which the plaintiff might reasonably fail to appreciate, and there has been no contributory negligence, the plaintiff may recover.

⁵ *Farrant v. Barnes*, 11 C. B. N. S. 553.

danger and is satisfied to take the risk, it becomes part of the contract between him and his employer that the servant shall expose himself to such risks as he knows are consistent with the employment."¹

With this must be taken the law as exemplified in *Sword v. Cameron*.² Defendants were lessees of a stone quarry, and the pursuer was employed there by them working a crane. Other servants were employed to blast rock. When the blasting was going on notice was given. On the occasion of the accident an insufficient time was allowed to get out of reach of the explosion consequent on the blasting. The pursuer, a workman, was severely injured; and in an action in respect of his injuries, was held entitled to recover.

In *Bartonshill Coal Company v. Reid*,³ Lord Cranworth thus explained the decision: "The injury was evidently the result of a defective system not adequately protecting the workmen at the time of the explosions. It is to be inferred from the facts stated, that the notices and signals given were those which had been sanctioned by the employer; and that the workmen had been directed to remain at their work near the crane till the order to fire had been given, and then, that after the interval of a minute or two the explosion should take place. The accident occurred, not from any neglect of the man who fired the shot, but because the system was one which did not enable the workmen at the crane to protect themselves by getting into a place of security." Explained by Lord Cranworth in *Bartonshill Coal Company v. Reid*.
The distinction between the cases may be thus expressed. The master is liable for all unnecessary dangers in the system of work, unless they are of a nature which the servant either knows or can judge of equally with the master. In practice there seems to be a presumption that the servant has this equal knowledge in all matters with which his work is directly concerned, and a presumption that he has *not* equal knowledge where it is the "system" from which the accident arises.⁴ Comment.

¹ In *Smith v. Dowell*, 3 F. & F. 238, Martin, B., directed a nonsuit where plaintiff was employed to make bulkheads, between two bunkers, to be filled with coal. Whilst so employed, defendant came to see, and said two struts were wanted to support the bulkhead, but told the men to get on with their work, and promised to send iron struts. Before they came the accident happened. The Court was afterwards moved, though no rule was granted. From the head-note it appears that any direction given by defendant was to be construed, not for them to do the dangerous work, but to do other work that might be proceeded with without danger. In *Ogden v. Rummens*, 3 F. & F. 751, Bramwell, B., said, at 755: "If a master knew of a danger, which his servant did not, and set him to it, he would be liable; but otherwise, if he did not know of it, or if his servant did, if a man chose to run a risk it was his own look-out."

² 1 Dunlop 493.

³ 3 Macq. (H. L. Sc.) 266, at 290.

⁴ *Robertson v. Brown*, 3 Rettie 652, may be referred to on this point, though there the facts, and not the law, were in dispute. See also *M'Ghie v. North-Western Railway Company*, 24 Sc. L. R. 370, where an engine-driver was killed while looking over the side of his engine by his head coming in contact with a bridge. Held, his representative could not recover.

Cook v. Stark. This latter is the principle on which *Cook v. Stark*,¹ another Scotch case, was decided. A workman in a quarry had been sent by the manager to assist an experienced man who had been engaged for half an hour in attempting to draw an unexploded charge of gunpowder from a rock, and was using a steel "pumper" for that purpose, which generated sparks and caused an explosion, whereby the man was injured. The Court looked on the operation as "highly dangerous and almost unprecedented," though not "so obviously dangerous that the pursuer, an inexperienced workman, was inexcusable in continuing to assist" in obedience to the order of the manager, and held the pursuer entitled to recover.

Smith v. Baker.

Sword v. Cameron was accepted in *Smith v. Baker*² in the House of Lords as a correct decision and as sufficient authority to decide the case then before the House. In the latter case the plaintiff was employed to drill holes in a rock cutting near a crane worked by men in another department of his employer's work. The crane was used for lifting stones which were sometimes swung over the plaintiff's head without warning. During the work a stone so swung fell on the plaintiff and injured him. The House of Lords, Lord Bramwell dissenting, were of opinion that a defective system of work under which workmen are not adequately protected renders the employer liable in the event of injury being caused thereby. "I think," said Lord Halsbury, C.,³ "the cases cited at your Lordships' bar, of *Sword v. Cameron*,⁴ and the *Bartonshill Coal Company v. McGuire*,⁵ established conclusively the point for which they were cited, that a negligent system or a negligent mode⁶ of using perfectly sound machinery may make the employer liable."

Williams v. Clough.

*Williams v. Clough*⁷ and *Watling v. Oastler*⁸ both turn on points of pleading. The former was on a special demurrer, the point being that it was consistent with the declaration in the case that the plaintiff had notice from the defendant that the ladder, the rottenness of which was the cause of the accident, was unsafe, or had the means of knowing of its insecurity. It was

¹ 14 Rettie 1.

² (1891) App. Cas. 325. See per Lord Halsbury, C., at 339, per Lord Watson, at 357, and per Lord Herschell, at 363.

³ L. c. at 339.

⁴ 1 Dunlop 493.

⁵ 3 Macq. (H. L. Sc.) 300.

⁶ By "a negligent mode" the Lord Chancellor probably intended to indicate a practice or method of doing business which is part of the general scheme of work; for the mode of doing any particular act would appear from the authorities to be attributable to the individual workman and not to the master, unless there were circumstances which fixed the latter with responsibility for the way in which such act was done.

⁷ 3 H. & N. 258.

⁸ 1. R. 6 Ex. 73.

alleged that the defendant was possessed of a ladder unsafe and unfit for use, yet, "well knowing the premises, wrongfully, and deceitfully ordered" the plaintiff, his servant, to carry corn up the ladder into a granary, and the plaintiff, believing the ladder to be fit for use, "and not knowing the contrary," carried the corn up the ladder, and whilst doing so was hurt. The Court held that this statement, in effect, if not in terms, sufficiently alleged the ignorance of the servant, and the declaration was therefore held good. Bramwell, B., differed from the rest of the Court to the extent of holding that the declaration should have negatived the *means* of knowledge of the servant, in addition to the mere actual knowledge; and that actual knowledge should have been negatived—by implication, if not directly—the whole Court was agreed.¹

In *Watling v. Oastler*,² again, the divergence from the strict doctrine of law was more apparent than real. The declaration set out that the defendants were owners of a factory and machine, and that G. W. was employed by them to work therein, and in the course of his employment it was necessary for him to enter the machine to clean it; that by the negligence of the defendant it was unsafely constructed and in a defective condition, and was, by reason of its not being sufficiently guarded, unfit to be used and entered, as the defendants well knew; and by reason of the premises, and also by reason, as the defendants well knew, of no sufficient apparatus having been provided by them to protect G. W., it was suddenly put in motion whilst he was at work in the machine, and he thereby sustained injuries. To this declaration there was a demurrer, on the ground that it should have been averred that G. W. was not aware of the danger and defect. The declaration was, nevertheless, held sufficient, on the ground that it raised the question of the defendants' personal negligence, and that "by reason of the negligence and default of the defendants" must be held to mean by their *mere* negligence and default. That is, assuming the necessity to negative G. W.'s knowledge of the defect of the machine, or the danger of the work, if the declaration were to be construed strictly as setting up a cause of action arising from an original defect in the machine, the decision, in this case, was that the cause of action need not be so regarded, and might be construed to arise from the personal negligence of the defendant apart from actual defective or dangerous condition of machinery—the machine "was suddenly put in motion." In that view, coupled with previous averments of the defendant's knowledge and intervention,

¹ The *dictum* of Crompton, J., in *Davies v. England*, 33 L. J. Q. B. 321, at 232, is therefore not in accord with what was actually decided in *Williams v. Clough*, 3 H. & N. 258.

² L. R. 6 Ex. 73.

the declaration might be read as alleging a personal and negligent interference by the master, to which knowledge, or want of knowledge, of G. W. would be relevant, under a defence of contributory negligence, but would not be necessary for the constitution of the original cause of action, which was complete when actual personal intervention of the master with consequent negligence and hurt was put in issue.¹

Griffiths v.
London and
St. Katharine
Docks
Company.

That this is the right interpretation to put on this decision is shewn by *Griffiths v. London and St. Katharine Docks Company*;² where, in an action of negligence brought by a servant against his master for the unsafe state of the premises on which the servant was employed, it was held that the statement of claim must contain averments of two facts: that "the danger which caused the accident was known to the master and unknown to the servant," without which there could be no cause of action for "wrongful condition of machinery on the premises on which the servant is to act." If, however, the actionable wrong is the personal negligence of the master, or may be so construed, there is nothing to prevent the servant recovering as if he were a stranger; and knowledge of the servant of the danger he incurs by working with a personally negligent master must be set up by pleading contributory negligence.

Clarke v.
Holmes.

Judgment of
Cockburn, J.

Even the conjunction of the circumstances of knowledge of the servant and ignorance on the part of the master is not necessarily conclusive against the servant's right to recover. In *Clarke v. Holmes*,³ a case where the judgment of the Exchequer Chamber turned on the common law liability of the master for defective machinery, Cockburn, C.J., thus expressed himself:⁴ "No doubt, when a servant enters on an employment from its nature neces-

¹ As to the averment of knowledge in a declaration and for a classification of the cases see *Smyley v. Glasgow and Londonderry Steam-packet Company*, Ir. R. 2 C. L. 24, per Pigot, C.B., at 29.

² (1884) 12 Q. B. D. 493, 13 Q. B. Div. 259, followed *Macleod v. The Caledonian Railway Company*, 23 Sc. L. R. 68; *M'Ternan v. White*, 17 Rettie 368. In New York the plaintiff must prove:—First, that the appliances, whatever their nature, were defective; second, that the master had knowledge of the fact; third, that the servant did not know, and had not the means of knowing, *Reardon v. New York Card Company*, 51 Hun (N. Y.) 134.

³ 7 H. & N. 937. "I do not think the majority of the Court there [in *Clarke v. Holmes*] coincided with what was said by two of the judges": per Byles, J., *Murphy v. Smith*, 19 C. B. N. S. 361, at 365. "I cannot follow the reasoning of some of the judges in the Ex. Ch." in *Holmes v. Clarke*: per Bramwell, B., in *Britton v. Great Western Cotton Company*, L. R. 7 Ex. 130, at 136. "The case of *Clarke v. Holmes* is one which it is not easy to place upon any very well-defined principle:" per Hoar, J., *Coombs v. New Bedford Cordage Company*, 102 Mass. 572, at 586. "The case of *Clarke v. Holmes* has been observed upon, but it has never been overruled, and it seems to me to be this case. It is binding on us, and, moreover, it is in my opinion rightly decided": per Lord Esher, M.R., *Thomas v. Quartermaine*, 18 Q. B. Div. 685, at 690. "The injured person may have had a statutory right to protection, as where an Act of Parliament requires machinery to be fenced. The case of *Clarke v. Holmes* is a case of that sort": per Bowen, L.J., at 696.

⁴ 7 H. & N. at 923.

sarily hazardous, he accepts the service subject to the risks incidental to it; or, if he thinks proper to accept an employment on machinery defective from its construction or from the want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment. The rule I am laying down goes only to this, that the danger contemplated on entering into the contract, shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept."

The judgment of Byles, J., went far beyond this. He was of opinion¹ "that the owner of *dangerous* machinery is bound to exercise due care that it is in a safe and proper condition"; and further, that "it is in most cases impossible that a workman can judge of the nature of a complex and dangerous machine wielding irresistible mechanical power, and, if he could, he is quite incapable of estimating the degree of risk involved in different conditions of the machine; but the master may be able, and generally is able, to estimate both." From this he draws the conclusion: "The master is neither, on the one hand, at liberty to neglect all care, nor on the other is he to insure safety, but he is to use due and reasonable care. The degree and nature of that care are to be estimated on a consideration of the facts of each particular case. I do not say that the degree of care is, in all cases, the same as the master must observe towards strangers."

Willes and Wightman, JJ., laid more stress on the statutory liability.²

Three different views, therefore, appear to have been advocated in *Clarke v. Holmes*:

First. That of Byles, J., that there is a special duty with regard to dangerous machinery "wielding irresistible mechanical power."

Second. That of Cockburn, C.J.,³ that there is an obligation on the employer to keep machinery without material deterioration during the employment.

Third. That of Willes and Wightman, JJ., that a statutory obligation imposes special duties. This we shall discuss subsequently.

¹ *L. c.* at 947.

² 31 *L. J. Ex.* 356, at 359, 360.

³ Crompton, J., seems in part at least to have concurred with Cockburn, C.J. After declining to give an opinion on the point of statutory liability, he says, 7 *H. & N.* at 946: "There was a neglect of duty on the part of the defendant in not keeping the machinery fenced, for which he is responsible."

Judgment of
Byles, J.

Willes and
Wightman,
JJ.'s, view.

Three views
of liability
in *Clarke v.*
Holmes.

View of Byles, J., considered.

The first opinion is that of Byles, J. The common law imposes no duty on a master to safeguard his servant from the risks incident to the employment,¹ provided only the servant has equal means of knowing the risks with the master.² This being so, it is obvious that the use of dangerous machinery in itself creates no greater liability than the use of ordinary machinery. The probability of the circumstances which import liability—knowledge on the part of the master, want of knowledge on the part of the servant, and a failure, from any cause, to assume the risks of the service—is, however, very much greater where machinery is in its nature dangerous, than where danger does not prominently exist. Byles, J., states a principle which involves a shifting of the ordinary legal presumption; for he lays it down that “it is in most cases impossible that a workman can judge of the condition of a complex and dangerous machine, wielding irresistible mechanical power, and, if he could, he is quite incapable of estimating the degree of risk involved in different conditions of the machine.”

In cases of this sort, then, the injured servant would have to give evidence, first, of injury; and next, that the machinery was dangerous. Thereupon the master would have to show, what Byles, J., regards as “in most cases impossible,” that the servant correctly estimated the risks. To do this, a presumption of incapacity, similar to that made in the case of young children employed in dangerous occupations, would have to be raised. Save for the opinion of Byles, J., there does not appear to be adequate authority for this; while it seems contrary to principle to presume an incapacity, especially in a case where the fact of undertaking the work would seem rather to presume a capacity, to execute it.³

Recent tendency of the law.

There is no doubt that the recent tendency of the judges has been towards the presumption of the workman's want of knowledge. Where an unskilled workman is injured by working about machinery of complicated construction, the presumption of his lack of knowledge of its complicated construction naturally arises;

¹ *Bartonshill Coal Company v. Reid*, 3 Macq. (H. L. Sc.) 266, at 298; *Dynen v. Leach*, 26 L. J. Ex. 221; *Saxton v. Hawkesworth*, 26 L. T. (N. S.) 851; per Bramwell, L.J., *Lax v. Mayor and Corporation of Darlington*, 5 Ex. Div. 28, at 35.

² *Ogden v. Rummens*, 3 F. & F. 751; *Macleod v. Caledonian Railway Company*, 23 Sc. L. R. 68, at 70.

³ Chitty, *Contracts* (12th ed.), 190. *Toute personne peut contracter si elle n'en est pas déclarée incapable par la loi*, Code Civil, liv. 3 tit. 3, s. 2, art. 1123. Upon which Rognon observes: *Le principe général est que tout le monde est capable; les incapacités sont conséquemment des exceptions, qui ne doivent jamais s'entendre aux cas non prévus.* In America it has been held, that when the master has notice of inexperience he is bound to give explicit warning, *Rummell v. Dillworth*, 111 Pa. St. 343; and that where there is a duty to give notice, actual notice must be given, and it is not enough to use reasonable care, *Wheeler v. Wason Manufacturing Company*, 135 Mass. 294.

just as if—to draw an illustration from the law of bailments—a blacksmith were intrusted with the mending of a watch, a very different amount of skill would be looked for from him than from a chronometer-maker of established fame. Where the injured workman is one who has undertaken charge of the machinery, and whose proper work it is, any such presumption of want of appreciation is unreasonable. To have been intrusted with the work, he must *prima facie* have represented himself as of adequate knowledge and skill to undertake it; and he should not, in the event of injury happening to him, be permitted to aver a different condition of things from that under which he was appointed.¹

The next view is that of Cockburn, C.J. His opinion, “that the danger contemplated on entering into the contract, shall not be aggravated by any omission on the part of the master to keep the machinery” without material deterioration during the employment, has the assent of Kelly, C.B.,² and is recognised in the earlier cases.³ The proposition is, notwithstanding, perhaps too broadly expressed, as importing an absolute duty on the master, and ignoring the possible application of the maxim, *Volenti non fit injuria*. This we have already seen is not excluded; and the master is not necessarily liable for even the most dilapidated condition of machinery.⁴

The most usual limitations of the rule of the master's liability for dangerous machinery were shortly afterwards more distinctly expressed in the *Nisi Prius* ruling in *Holmes v. Worthington*,⁵ by Willes, J., one of the judges who restricted their concurrence in *Clarke v. Holmes* to an assent to the propositions necessary for the actual decision. The facts proved shewed that from defect of a rope used in hoisting casks, the rope broke and a cask fell upon plaintiff. Willes, J., refused to nonsuit, saying: “There is no case deciding that where the employer and the servant are both aware that the machinery is in an unsafe state, and the servant goes on using it under a reasonable belief that it will be set right by the employer, and it is *not* set right, and he suffers an injury, he cannot sustain an action.” In summing up he said: “If the defendants knew of the defect and undertook to repair it, and the plaintiff went on working, relying on their repairing it, then they may be liable. If the plaintiff complained of the defect and the defendants promised that it should

View of Cockburn, C.J., considered.

Holmes v. Worthington.

View of Willes, J.

¹ Cp. the remarks of Bramwell, B., *Britton v. Great Western Cotton Company*, L. R. 7 Ex. 130, at 136, and *post*, 768.

² *Murphy v. Phillips*, 35 L. T. (N. S.) 477, at 478.

³ Per Lord Cranworth, 3 Macq. (H. L. Sc.) 266, at 290.

⁴ *Ante*, 745.

⁵ 2 F. & F. 533, at 534.

Bowen, L.J.,
in *Thomas v.*
Quartermaine.

be remedied, he is not to be deprived of his remedy, merely because, relying on their promise, he remained in their employment. You must, however, be satisfied that they (*i.e.*, the defendants) were¹ aware of the defect, and that the accident arose from it, and not from plaintiff's want of care." The law is very clearly stated by Bowen, L.J., in *Thomas v. Quartermaine*:² "Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one, *viz.*, that the risk has been voluntarily encountered, the defence seems to me complete." The same point is insisted on in *Hough v. Texas, &c. Railway Company*,³ an action where an engineer was killed by the overturning of an engine through a defective cowcatcher which dislodged an imperfectly fitted whistle, whereby an engineer was scalded to death. "That the engineer knew of the alleged defect was not, under the circumstances, and as matter of law, absolutely conclusive of want of due care on his part"; while in *District of Columbia v. M'Elligott*⁴ the comment was added "knowledge . . . was a fact to be considered by the jury in connection with other facts in determining whether the engineer exercised that caution which all the circumstances required."

The Scotch
decisions not
at one with the
English.
Crichton v.
Keir.

The judges, in the Scotch Court of Session, in *Crichton v. Keir*,⁵ seem to have misread the English case of *Clarke v. Holmes*,⁶ as they there distinguish it on the ground of "an antecedent statutory obligation on the master to fence the machinery."⁷ This we have already seen was not the *ratio decidendi*. Proceeding, however, on that assumption, they distinguish the case before them where the servant was induced to continue in an employment by a promise of providing a young and efficient horse in place of an old and inefficient one, and held that where "a servant in face of manifest danger chooses to go on with his work, he does so at his own risk, and not at the risk of his master"⁸—in other words, that knowledge is, *per se*, an

¹ *I.e.*, "Ought to have been." See per Cockburn, C.J., *Webb v. Rennie*, 4 F. & F. 608.

² 18 Q. B. Div. 685, at 697. The Irish case of *Ratray v. Cork and Macroom Railway Company*, 4 L. R. Ir. 386, appears to lean to the view that knowledge *per se* is enough. To the extent it does this it is of course not an authority. Lord Herschell's remarks on *Thomas v. Quartermaine*, in *Smith v. Baker* (1891), App. Cas. 325, at 365 *et seqq.*, are merely *obiter* and balanced by the view taken by Lord Morris at 369. Further they appear to have been induced by an incorrect apprehension of the facts. See *Law Quarterly Review* (1892), vol. viii. 202, an article on *Smith v. Baker*.

³ 100 U. S. (10 Otto) 213 at 225.

⁴ 1 Macph. 407

⁵ 117 U. S. (10 Davis) 621, at 632.

⁶ 7 H. & N. 937.

⁷ Per Lord Benholme, 1 Macph. at 411: "It appears to me, however, unnecessary to decide this question" (*i.e.*, whether any liability in the defendants arises under the statutes providing for the fencing of machinery): per Cockburn, C.J., *Clarke v. Holmes*, 7 H. & N., at 943.

⁸ Per Lord Justice-Clerk Inglis, 1 Macph. 411.

answer to the action. This is, as we have seen, quite contrary to the English cases, by which knowledge is but an element for consideration and not the sufficient test of voluntarily continuance in dangerous work.

*Fraser v. Hood*¹ professedly follows *Crichton v. Keir*, and is *Fraser v. Hood*. open to the same criticism. The pursuer, a servant of the defendants, was directed to tie up a horse, which bit him as he was doing so. In his averments the pursuer set out that "the horse in question, which was an entire horse, was a vicious and dangerous animal, and on several previous occasions it had attacked, bitten, and severely injured those who were in charge of it." The defender objected that the pursuer's averments shewed him to be aware the horse was vicious, and that he incurred danger by entering its stall when it had got loose; and the Court allowed the objection to prevail. The Lord President (Inglis) thus set out the material facts and expressed the ground of the decision: "The pursuer had been for some time in the employment of the defender as a carter, having only recently been made a stableman, and he therefore obviously knew, what was known to every one else, that the horse was a dangerous horse, and had attacked, bitten, and severely injured persons in charge of it, and he was therefore aware of the risk he incurred in entering the stall to tie up the horse." Apart altogether from the consideration that *sciens* is not necessarily *volens*, the Lord President makes other assumptions certainly not allowable in an English case in a proceeding analogous to demurrer. For instance, the inference that a carter "obviously knew" the disposition of a horse there was no evidence he had ever had to drive, is neither a necessary nor a natural one; neither again does the inference that the disposition of the horse "was known to every one else" seem a permissible one in the absence of other evidence than an averment that the horse had on several previous occasions "attacked, bitten, and severely injured those who were in charge of it," proof of which might be given by those injured without shewing any privity of the pursuer. Neither then in the proposition of law enunciated, nor by the process of reasoning by which it is applied to the facts, can this case be looked on as satisfactory from the standpoint of the English decisions.

Judgment of
Lord President
Inglis.

In *Wilson v. Boyle*² a somewhat similar case, where a horse had a habit of turning restive when near a steam engine, the jury found "that the defendant was blameworthy in having the horse in his possession, for use by his carters, not being broke

Wilson v.
Boyle.

¹ 15 Rettie 178.

² 17 Rettie 62.

to steam engines" and "the pursuer knew of the horse's condition and character and the risk he ran in taking charge of it." On these findings judgment was entered for the defender, and the case does not seem open to the criticisms on the earlier cases. The first finding, however, in so far as it assumes to lay down a general rule of liability was beyond the competence of the jury; while in so far as it applied to the particular facts before them, it was irrelevant to their conclusion; since the pursuer took the horse, not in the ordinary course of his work, but by virtue of a special arrangement with his master.

The law in the United States summarized in three propositions.

The United States case of *Hough v. Texas, &c. Railway Company*¹ recognises and follows the law as laid down in *Holmes v. Worthington*,² and *Clarke v. Holmes*,³ which may be presented in three propositions:

1. Where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as would be reasonable to allow for its performance; and for an injury suffered within any period that would not preclude reasonable expectation that the promise would be kept.⁴

2. Where the servant, having the right to abandon the service, because it is dangerous, refrains from doing so, in consequence of assurances that the danger shall be removed, the master is not in the exercise of ordinary care unless, and until, he makes the assurances good, and the assurances remove all ground for the argument that the servant by continuing the employment undertakes the risk.⁵

3. Where the servant continues at a dangerous employment after a promise to remedy a defect, it will be for the jury to say whether the defect was of such a nature that only a reckless man utterly careless of his own safety would have continued to work without the application of a remedy; and knowledge of danger is not, as matter of law, conclusive of want of due care.⁶

Washington and George Town Railroad Company v. McDade.

Washington and George Town Railroad Company v. McDade,⁷ in the Supreme Court of the United States very clearly sets out the rule of law as follows: "Neither individuals nor corporations are

¹ 100 U. S. (10 Otto) 213. Mr. Justice Harlan, in delivering the judgment of the Court, elaborately examines the English decisions, 220-223.

² 2 F. & F. 533.

³ 7 H. & N. 937.

⁴ Shearman and Redfield, Negligence (3rd ed.) § 96, but see (4th ed.) § 208.

⁵ Cooley, Torts, 559 (2nd ed.), 661.

⁶ *District of Columbia v. McElligott*, 117 U.S. (10 Davis) 621. See *Greenleaf v. Illinois Central Railroad*, 29 Iowa, 14; also *Kane v. Northern Central Railroad*, 128 U. S. (21 Davis) 91; *Delaware, &c. Railroad Company v. Converse*, 139 U. S. (32 Davis) 469.

⁷ 135 U. S. (28 Davis) 554, at 570, per Lamar, J., delivering the judgment of the

bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employés. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him and was unknown to the employé or servant. But if the employé knew of the defect in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery. And further, if the employé himself has been wanting in such reasonable care and prudence as would have prevented the happening of the accident, he is guilty of contributory negligence, and the employer is thereby absolved from responsibility for the injury, although it was occasioned by the defect of the machinery through the negligence of the employer."

In this place, *Riley v. Baxendale*¹ may be noted, a case in which an attempt was made to avoid the law as laid down in *Williams v. Clough*² by alleging a contract that "the defendants should take due and ordinary care not to expose the said J. R. to extraordinary danger and risk in the course of his said employment." The effect of this was to prevent the defendant demurring, and put him to a traverse of the fact. The judge at the trial nonsuited the plaintiff on the opening,³ and the nonsuit was upheld on motion, Pollock, C.B., saying: "Generally speaking, a mere duty cannot be turned into a contract, and great inconvenience would result if we were to permit it to be declared on as such. If the obligation had been alleged as a duty, the defendant might have demurred. But when it is alleged as a contract the defendant

*Riley v.
Baxendale.*

Duty cannot be
turned into a
contract.

Court. In another case it is said: "Every manufacturer has a right to choose the machinery to be used in his business, and to conduct that business in the manner most agreeable to himself, provided he does not thereby violate the law of the land. He may select his appliances, and run his mill with old or new machinery, just as he may ride in an old or new carriage, navigate an old or new vessel, or occupy an old or new house as he pleases. The employée, having knowledge of the circumstances, and entering his service for the stipulated reward, cannot complain of the peculiar taste and habits of his employer, nor sue him for damages sustained in and resulting from that peculiar service." *Hayden v. Smithville Manufacturing Company*, 29 Conn. 548, at 558; approved *Tuttle v. Milwaukee Railway Company*, 122 U. S. (15 Davis) 189, at 194. The same is laid down as law in Scotland, *M'Gill v. Bowman*, 18 Rettie 206.

¹ (1861) 6 H. & N. 445.

² 3 H. & N. 258.

³ As to the correctness of this see *Fletcher v. London and North-Western Railway Company* (1892), 1 Q. B. 122, and *ante*, 14.

cannot demur, because it is possible that there may be such a contract in point of fact." There is no such implied contract.

Obligation of the master with regard to machinery where there is no question of direct personal negligence.
Vaughan v. Cork and Youghal Railway Company.

The obligation on the master with regard to machinery, where the question of direct personal negligence is not raised, is considered in *Vaughan v. Cork and Youghal Railway Company*¹ on demurrer. The declaration set out that the deceased was employed by the defendants to work in a passage where was a wall of which the defendants had absolute control, and that "whilst" the deceased "was actually" engaged at his work "along the said passage" for the said defendants as aforesaid, and at their request, the said wall became, and was, ruinous, and fell upon "the deceased."

Judgment of Pigot, C.B.

"For some time," says Pigot, C.B.,² "I was disposed to think that the plaint did not sufficiently disclose a cause of action. It is clearly established that, if a servant voluntarily undertakes an employment which, in its nature, is an employment of danger, he does so as his own insurer against the risk. The master is not responsible to his servant for injuries resulting from the danger of an employment into which the plaintiff voluntarily enters, under circumstances in which the risk is necessarily and obviously connected with the employment." "But the employer is bound to use all reasonable care to protect his workmen from dangers which are unknown to them, and which he knows, and must be presumed to know. And on looking more narrowly into the frame of this summons and plaint, I think it must be construed as shewing that the wall *became* ruinous and dangerous by the defendants' negligence *after* the plaintiff was engaged in the service, and while he was actually employed in doing the work, the wall being in the actual 'possession and under the control and dominion of the defendants.' Upon that statement the defendants can hardly be treated otherwise than as directly and personally cognizant of the altered condition of the wall; and if the wall became ruinous and dangerous, while the deceased was engaged in the work near it, either he ought to have been made acquainted with the change which caused new risk to his employment, or precautions ought to have been taken to secure him from the danger."³

Rule indicated by this judgment.

The case is important as laying stress on the fact that, with reference to the same man and the same machinery, there may be two different species of obligation. If the machinery is in a

¹ (1860) 12 Ir. C. L. R. 297. The Scotch cases are noted in *Watt v. Neilson*, 15 Rettie 772. For cases as to "known danger," see *post*, 840 *et seqq.*

² 12 Ir. C. L. R. at 303.

³ *McInally v. King*, 24 Sc. L. R. 15.

dangerous condition when the workman enters on the work, no obligation is presumed on the employer to alter or improve it¹ unless there is any concealment about it; but where the workman enters on the work with all the accessories in a reasonably fit condition, and by reason of non-repair or absence of supervision such condition becomes altered so that an accident occurs, then the presumption is that the employer is guilty of negligence; for it is not the duty of the workman to watch the gradual attrition of machinery or plant until it is in such a state that danger may probably arise, and then to give notice to the master, so that repairs may be executed, or, in the alternative, the contract varied; while it is the duty of the employer when the workman has entered upon an employment with reasonably fit and proper machinery, and undertaking no more than the ordinary risks, to keep all the surroundings of the work in suitable condition; and the burthen of proof lies on him to shew he has done so. The workman's duty is to get on with his work to the best of his ability, and while doing his duty he is entitled to trust to the master doing his.

This is in accord with the law as laid down in *Murphy v. Phillips*.² Plaintiff was injured by the breaking of a chain, Acted on in
Murphy v.
Phillips. caused partly by bad welding, and partly by its worn condition. "It then became a question, whether, from whatever cause the accident may have occurred, it was or not the duty of the defendant, as the master and employer of the plaintiff, to see and examine from time to time the state and condition of the chains and other machinery employed upon his premises in his business. I am of opinion very clearly that it was, and that the defendant was bound from time to time, as the occasion might require, to have the chains used in his business, and of course, therefore, the particular chain in question, properly and duly examined and tested periodically."³

Again, in *Webb v. Rennie*,⁴ where injury arose from the Webb v.
Rennie. fall of a scaffold pole through rottenness and it was proved

¹ *Dynen v. Leach*, 26 L. J. Ex. 221.

² (1876) 35 L. T. (N. S.) 477; *Spicer v. South Boston Iron Company*, 138 Mass. 426, the case of a flaw in an iron hook used to raise a furnace door, which a careful inspection would have revealed. *Warner v. Erie Railway Company*, 39 N. Y. 468, the case of a structure originally sufficient, but rendered unsafe by gradual decay, which, under the careful inspection of competent agents in modes deemed sufficient by skilful and competent men, had not been discovered. *Henderson v. Carron Company*, 16 Rettie 633; *Milne v. Townsend*, 19 Rettie 830. *Murphy v. Phillips* is distinguished in *Black v. Ontario Wheel Company*, 19 Ont. R. 578, and in *Hanrahan v. Ardnamult Steamship Company*, 22 L. R. Ir. 55.

³ 35 L. T. (N. S.), per Kelly, C.B., at 478.

⁴ 4 F. & F. 608, at 613; *O'Donnell v. Allegheny Valley Railroad Company*, 59 Pa. St. 239, a case where wood, that had been in the soil an unreasonable length of time, gave way.

that the end had been in the earth two years without examination, Cockburn, C.J., directed the jury that "the servant had a right to expect that he shall only be exposed to the ordinary risks of the employment, and that the machinery or apparatus about which he is to be employed, and out of which danger arises, shall be attended to with reasonable care, to ensure its being in a fit state to be worked without undue or extraordinary danger to those employed in or about it; and although in general an employer was not liable unless he knew of the danger, yet it was his business to know if, by reasonable care and precaution, he could ascertain whether the apparatus or machinery were in a fit state or not. It was not enough, therefore, that the master did not know of the danger if, by reasonable care he might have known, and if, reasonably, he ought to have known, and to have taken the proper means of knowing. It followed that, although he would not be liable merely on account of the negligence of his servants, yet it was his duty either himself to take the proper means of knowing of the danger, or to employ some competent person to do so."

A second ground on which these cases may be supported.

These cases may further be supported as coming within the rule that where the master has a greater means of knowing than the workman he owes a greater duty to him; for the matter in question being not within the ordinary sphere of duties of the servant, he is not to be presumed to concern himself with them, or to be acquainted with them; he is entitled to assume, in the absence of a suggestion to the contrary, that everything is efficiently and carefully provided for.

Allen v. New Gas Company.

Allen v. New Gas Company¹ was argued and decided (at least so far as appears from the report) exclusively on the ground of the duty of employers to employ a competent person to take charge of their premises, and without reference to their duty to see to the condition of the tackle and machinery. Plaintiff's injuries were caused by the falling upon him of some gates built into a framework on the premises of the defendants where the plaintiff was at work. They had been some time out of repair, gradually getting "from bad to worse." If closed, or partially closed, they were unsafe, but if left open and wedged up they were safe. Defendants' manager had notice of the unsafe condition of the gates and directions to repair had been given, but nothing was shewn to have been done. When the plaintiff left work, the gates, were opened and wedged up; when he returned, one was open, the other shut. How this came about there was no evidence to shew. By reason of their defective condition they fell

¹ Ex. D. 251.

upon the plaintiff and injured him. A verdict for the plaintiff was set aside by the Divisional Court, and a verdict entered for the defendants, on the ground that the plaintiff "had not shewn that the persons employed by the defendants were incompetent, and the negligence, if any, which caused the accident was that of a fellow-workman of the plaintiff."

The point that there is a personal duty on the employer to see to the maintenance of his premises in a condition of reasonable safety is thus glanced at in the judgment: ¹ "There was no evidence to shew that the premises of the defendants were dangerous,² that these gates were defective in their original construction, or that they had not been perfectly safe when first put up. If they had fallen into a state of decay, and had been permitted to remain in that state, it could scarcely be said that that was the act of the defendants, but must have been that of the persons whom they must have employed, and there was no evidence to shew that such persons were not proper and competent for the defendants to employ." However, what the learned judge ³ who delivered the judgment in *Allen v. New Gas Company* considered "could scarcely be said," had actually been held, as we have seen, by Pigot, C.B., in *Vaughan v. Cork and Youghal Railway Company*,⁴ and by Cockburn, C.J., in *Webbe v. Rennie*,⁵ while the Exchequer Division itself, a few weeks after the judgment in *Allen v. New Gas Company*, arrived at a decision in conflict with the learned baron's *dictum*.⁶

Question as to a personal duty on the employer to see to the maintenance of his premises.

From anything that appears in the report, there is no suggestion that it was the special duty of any one to see to the condition of the working surroundings at the gas works;⁷ and if the fact of there being a foreman were sufficient to discharge the employer's liability to see to the reasonably safe condition of his premises, the special duty on the employer requiring him personally to see to machinery and plant, would be negatived and evaded by the mere appointment of such a foreman. Moreover, as we have

Allen v. New Gas Company discussed.

¹ Per Huddleston, B., at 256.

² "The evidence was, that these gates *if left open and wedged up, were safe; but if closed, or partially closed, there was danger that they might fall*," at 251; and also by consequence if they were left open *but not wedged up*. In short, without additional and special precautions, they *were dangerous*.

³ Huddleston, B.

⁴ 12 Ir. C. L. R. 297.

⁵ 4 F. & F. 608, at 613.

⁶ *Murphy v. Phillips*, 35 L. T. (N. S.) 477; cp. *Spicer v. South Boston Iron Company*, 138 Mass. 426.

⁷ Huddleston, B., says, "assuming it to have been the negligence of Farren, that would be negligence of a fellow-servant." Quite so. But why assume it at all? Why not discuss the case as raising the question of the duty of the employer to see that the risks surrounding the work are not greater than was apparent?

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As to the duty of the master with regard to the use of machinery and appliances, the remarks in an American case³ are so forcible and apposite, that though lengthy they warrant insertion here. The master, it is said, performs his duty when he furnishes machinery "of ordinary character and reasonable safety, and the former is the test of the latter; for in regard to the style of implement or nature of the mode of performance of any work, 'reasonably safe' means 'safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they

¹ *Holmes v. Worthington*, 2 F. & F. 533; *Stanforth v. Burnback Foundry Company*, 24 Sc. L. R. 722.

² Another inaccuracy in the judgment may be noted. Huddleston, B., says at 254: "We think the mischief in this case arose from the conduct of the plaintiff's fellow-workmen as such, and not from the defendants' default, *nor from the default of any manager or vice-proprietor.*" It is clear from the decisions that the Courts refuse to recognize any such distinction. *Wilson v. Merry*, L. R. 1 Sc. App. 326; *Howells v. Landore Siemens Steel Company*, L. R. 10 Q. B. 62.

³ *Titus v. Bradford, &c. Railroad Company*, 136 Pa. St. 618, at 626, 20 Am. St. R. 944.

cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community."

The master is not required so to provide as to dispense with any forethought on the part of the man. He will discharge his duty if he provides proper appliances, although he leaves the determination of the time for resorting to them to the men ; that is, if the opportunities of the men for determining on the matter are at least equal to his own. When the necessity of executing repairs springs from the daily use of appliances, the master is of course bound to provide the means of executing the repairs necessary ; but when the master has done his duty in this respect, it is for the servants themselves to secure themselves in those matters which may easily be remedied and do not involve permanent operations of the labour of skilled mechanics ; for instance, where ropes have a habit of wearing out and the master has supplied an ample stock which may be resorted to when required in order to replace those worn out in his service, the duty of substituting new for old when requisite and of judging when requisite is on the servants and not on the master, and so with the use of tools liable to break, buckets to become leaky, protections in dangerous occupations to become ineffectual from any constant or recurrent cause, and other materials coming within the scope of the principle involved.¹ The only cases in which this principle has been definitely laid down are, it is true, American, yet the principle itself seems the necessary outcome of doctrines recognized alike in English and American law and, should occasion arise, will doubtless be authoritatively engrafted amongst English decisions.

Here it may be well to note a distinction marking the line between those cases where the injured person cannot recover against the employer because the employer is not responsible for the happening of the injurious event which is brought about through miscarriage of machinery ; and those in which he is held liable on account of the bad condition of machinery. The master is liable in all cases where there has been neglect in providing proper machinery and competent servants. He is not liable when the injury results from the *management* of proper machinery by servants not incompetent.²

Master not required to think instead of his workmen.

Distinction between cases where the action arises from neglect in providing proper machinery and competent servants, and the cases where the injury arises from the management of machinery.

¹ *Cregan v. Marston*, 126 N. Y. 568, 22 Am. St. R. 854 ; *McGee v. Boston Cordage Company*, 139 Mass. 445 ; *Johnson v. Boston Tow Boat Company*, 135 Mass. 209, 46 Am. R. 458.

² *Bartonshill Coal Company v. Reid*, 3 Macq. (H. L. Sc.) 266, at 297. Cp. *Ormond v. Holland*, E. B. & E. 102, where it was a ladder that caused the accident, and the defendants "used more than ordinary care, and took extraordinary precautions that the plant should be sufficient," per Lord Campbell, at 105 ; also *Armour v. Hahn*, 111 U. S. (4 Davis) 313.

III. STATUTORY DUTY.

III. Statutory
duty.
Senior v. Ward.

We now come to the consideration of the effect on the master's liability of the imposition of a statutory duty. *Senior v. Ward*¹ is the first case to be noted in this connection. Rules for the regulation of the defendant's coal mine were approved under the 18 & 19 Vict. c. 108. By one of these, every morning, before any one descended the shaft of the mine, the cage was to be inspected by the engineman, and "the ropes and loaded cages are then to be run slowly twice up and down the pit before any person descends or ascends." The defendant, who superintended the working of his colliery, allowed the rule to be entirely neglected. The night before the accident the rope by which the cage was suspended was injured by fire. On the morning of the accident the miners were told by the banksman that they had better examine the rope before they went down; they neglected to do so, the rope broke as the cage descended, and those in it were killed. The Court held that the case came within the maxim, *Volenti non fit injuria*; yet indicated its opinion that, apart from knowledge and acceptance of the danger by the deceased, the defendant would have been liable, though the negligence was, in the last instance, the negligence of the banksman, who was a fellow-workman; as there was most culpable negligence on the part of the defendant personally in neglecting to see to the observance of the statutory rule and in keeping a banksman whom he knew habitually disregarded it; and either of these circumstances was sufficient to import liability.

The maxim,
*Volenti non fit
injuria*.

Two questions suggested by the decision, and requiring more attention for their elucidation than they received, are (1) what is the precise import of the maxim, *Volenti non fit injuria*? and (2) with what circumstances, if any, does the maxim apply in the case of the violation of a statutory obligation?

I. What is the
import of the
maxim.
Bowen, L.J.,
distinguishes
between cases
of contributory
negligence and
cases where
the maxim
applies.

I. THE IMPORT OF THE MAXIM VOLENTI NON FIT INJURIA.

It is pointed out by Bowen, L.J.,² that the effect of the

¹ 1 E. & E. 385. See *Johnston v. Boston Tow Boat Company*, 135 Mass. 209, 46 Am. Rep. 458. The master's duty with regard to ropes and appliances of that sort which are in daily use and which when they become defective may easily be remedied by the servants themselves, is well treated in *Cregan v. Marston*, 126 N. Y. 568, 22 Am. St. R. 854.

² *Thomas v. Quartermaine*, 18 Q. B. Div. 685, at 697. "I was surprised to find that any person could gravely raise a doubt on this question, as we have decided over and over again in this Court, and notably in the case of *M'Carthy v. British Shipowners' Company*, 10 L. R. 1r. 384, that a defence of contributory negligence is only an amplified form of denial that the injury was caused by the negligence of the defendant," per Dowse, B., *M'Evoy v. Waterford Steamship Company, Limited*, 18 L. R. 1r. 159, at 165.

maxim, *Volenti non fit injuria*, is by no means conterminous with the defence of contributory negligence. "Contributory negligence," says he, "arises when there has been a breach of duty on the defendant's part, not where, *ex hypothesi*, there has been none. It rests upon the view that, though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness, severed the causal connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury. It is for this reason that under the old form of pleading the defence of contributory negligence was raised in actions based on negligence under the plea of 'not guilty.' It was said, and said rightly, in *Weblin v. Ballard*,¹ that, in an inquiry whether the plaintiff has been guilty of contributory negligence, the plaintiff's knowledge of the danger is not conclusive. Obviously such knowledge may have even led him to exercise extraordinary care. But the doctrine of *Volenti non fit injuria* stands outside the defence of contributory negligence and is in no way limited by it. In individual instances the two ideas sometimes seem to cover the same ground, but carelessness is not the same as intelligent choice, and the Latin maxim often applies when there has been no carelessness at all. A confusion of ideas has frequently been created in accident cases by an assumption that negligence to the many who are ignorant may be properly treated as negligence as regards the one individual who knows and runs the risk, and by dealing with the case as if it turned only on a subsequent investigation into contributory negligence. In many instances it is immaterial to distinguish between the two defences, but the importance of the distinction was pointed out by Erle, C.J., in his summing up to the jury in *Indermaur v. Dames*,² and by Cockburn, C.J., in *Woodley v. Metropolitan District Railway Company*.³ To prove negligence it is not enough to shew that the defendant has been negligent to others; the plaintiff must shew that there has been a breach of duty towards himself. These two defences, that which rests on the doctrine *Volenti non fit injuria*, and that which is popularly described as contributory negligence, are quite different."

That a person guilty of contributory negligence should not recover even when the injury arises from neglect to observe a statutory duty is not only reasonable, but clear law.⁴ For, in

Contributory negligence as affected by statutory duty.

¹ 17 Q. B. D. 122.

² L. R. 1 C. P. 274, at 277.

³ 2 Ex. D. 384, at 390.

⁴ *Senior v. Ward*, 1 E. & E. 385, *Caswell v. Worth*, 5 E. & B. 849. The remark of Pigott, B., "I should have been better satisfied if *Caswell v. Worth* had been otherwise decided; and that the master there should have been held liable, as he had been

such a case, the plaintiff has failed to establish the proposition on which alone he is entitled to recover damages—that the injury happened through the defendant's negligence.¹ The neglect of the statutory duty may involve the person guilty thereof in penalties, yet the law will not allow the injured person to recover because he is himself consenting to the violation of law and to his own wrong. The consideration of this view of the matter must, for the present, be postponed.²

Where there is no contributory negligence, and the injury arises from the dangers of the work, the position of things is different.³ There is, first, a duty on the employer to provide reasonable and fit machinery. And his liability in this respect is determined by considering whether he has knowledge, and his servant is ignorant, of all defects in the condition and repair of the surroundings amongst which the servant has to work.⁴ In that event—of knowledge of the master and ignorance of the servant—the master is liable; even though the condition of things is the same as when the servant entered the employment. And this is so because the law implies an obligation on the master to make the servant as well acquainted with the circumstances of the work as he is himself; failure to discharge this duty imposed by law affects the master with a similar liability to that which would arise if he were a fellow-workman with his servant, and negligently or recklessly using tools, caused an injury to his servant. This brings us to a more detailed consideration of the meaning and scope of the rule summarized in the maxim, *Volenti non fit injuria*.

The maxim is applicable in diverse circumstances, though its weight is by no means uniform.

A trespasser who injures himself by intermeddling cannot by his wrongful act impose a duty upon another;⁵ his act being

clearly guilty of a breach of his statutory duty," overlooks the difference in the application of the maxim *Volenti non fit injuria*, and the defence of contributory negligence. That the distinction was not absent altogether from his mind appears from the following passage: "It seems that even although there may be a statutory duty imposed on the employer, the workman must still be careful of his own safety": *Britton v. Great Western Cotton Company*, L. R. 7 Ex. 130, at 139. The case of *Caswell v. Worth*, was, however, decided on demurrer, where the only point was whether a plea that set up contributory negligence was good. *M'Evoy v. Waterford Steamship Company*, 18 L. R. Ir. 159.

¹ "In most cases it is well-nigh impossible for the plaintiff to lay his evidence before a jury or the Court without disclosing circumstances which either point to or tend to rebut the conclusion that the injured party was guilty of contributory negligence": per Lord Watson, *Wakelin v. London and South-Western Railway Company*, 12 App. Cas. 41, at 48.

² See *post*, 778, *et seqq.*

³ *Mulligan v. M'Alpine*, 15 Rettie 789.

⁴ *Griffiths v. London and St. Katharine Docks Company*, 12 Q. B. D. 493, 13 Q. B. Div. 259.

⁵ *Degg v. Midland Railway Company*, 1 H. & N. 773, at 782.

wrongful, he cannot claim in respect of the risks with which it was attended.

Again, he who roams over the property of another must be held to do so subject to the liability of himself bearing all injury from dangers encountered while so using the licence; with the proviso, however, that the owner of the property is not wilfully to deceive him, or to do any act which may place him in danger.¹ But it is in the case of the existence of the relation of master and servant that the application of the rule is now most frequently invoked.

The existence of the risk from which the injury has arisen may either have been (1) contemporaneous with, or (2) subsequent to, the entry upon the employment, and may arise from a state of things either indifferent in itself or forbidden by statutory enactment.

Risk either contemporaneous with, or subsequent to, the entry by the servant upon the employment.

(1) If the existence of the risk is contemporaneous with the entry by the servant upon the employment, and manifest to him, and there is no statutory duty to remedy it, it forms one of the terms of the employment, and the rule, *Volenti non fit injuria*, applies, since the risk is thus a condition of the service. This is expressed by Lord Esher, M.R., in *Yarmouth v. France*:² "Before the Employers' Liability Act there was this condition in the contract of hiring, that, if there was a defect in the premises or machinery which was open and palpable, whether the servant actually knew it or not, he accepted the employment subject to the risk. That is the doctrine which is embodied in the maxim, *Volenti non fit injuria*."

(1) Where the risk is contemporaneous.

(2) The conditions of an employment may be altered and become dangerous after the contract of employment is entered into.

(2) Where the risk is subsequent.

This case was, apparently, not for the moment present to the mind of Lord Esher, M.R., when he said, in *Yarmouth v. France*:³ "The maxim, *Volenti non fit injuria*, was not wanted as between master and servant. It was only wanted, if at all, where no such relation as that of master and servant existed." Since that relation seems one where the maxim is certainly not exclusively yet still particularly applicable.⁴ In its inception the contract of the workman with his employer is to work on machinery in a certain condition. During the employment a change, either in the machinery itself or in its condition, followed by an accident, raises, not the question of the original employment, but the effect

Dictum of Lord Esher, M.R.

¹ *Gautret v. Egerton*, L. R. 2 C. P. 371.

² 19 Q. B. D. 647, at 653.

³ *L. c.* at 651.

⁴ "The maxim," says Lord Herschell, in *Smith v. Baker* (1891), App. Cas. 325, at 360, "has no special application to the case of employer and employed, though its application may well be invoked in such a case."

*Dictum of
Cockburn, C.J.*

of the workman's subsequent conduct. The application of the rule, and the difference in its operation from the former case, are noticed by Cockburn, C.J., in *Clarke v. Holmes*.¹ "I am, however, of opinion," he says, "that there is a sound distinction between the case of a servant, who knowingly enters into a contract to work on defective machinery, and that of one, who, on a temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under a promise that the defect shall be remedied."² In these circumstances a plea by the master, that the servant undertook the risks, is met by the replication that the existing state of the machinery differed from its condition at the time of entering on the employment, and is not one of the risks which the servant undertook to bear. On proof that the condition of things has been altered subsequently to the servant entering upon the employment, the master has to shew that the workman has voluntarily undertaken the danger; for the risk involved constitutes an addition to those incident to the service; and it is not more than the dangers ordinarily incident to the service that the common law holds the servant to undertake. Then comes the question, What is a voluntary undertaking? In *Woodley v. Metropolitan District Railway Company*,³ Cockburn, C.J., considers the various aspects the case may assume as follows: "A man who enters on a necessarily dangerous employment with his eyes open, takes it with its accompanying risks. On the other hand, if the danger is concealed from him and an accident happens before he becomes aware of it, or if he is led to expect, or may reasonably expect, that proper precautions will be adopted by the employer to prevent or lessen the danger, and from the want of such precautions an accident happens to him before he has become aware of their absence, he may hold the employer liable. If he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on the employment, or of the want of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it, he is in the same position as though he had accepted it with a full knowledge of its danger in the first instance, and must be taken to waive his right to call upon the employer to do what is necessary for his protection, or in the alternative to quit the service. If he continues to take

What is a
voluntary
undertaking?
Different views
in *Woodley v.*
Metropolitan
District
Railway
Company.
Cockburn,
C.J.'s, view.

¹ 7 H. & N. 937, at 944.

² Cp. Mellish, L. J., *Woodley v. Metropolitan District Railway Company*, 2 Ex. Div. 384, at 393.

³ 2 Ex. Div. 384, at 388.

the benefit of the employment, he must take it subject to its disadvantages." In the same case Mellish, L.J.,¹ refused his assent to the proposition that it is "a necessary inference in point of law," that working after knowledge of danger is an acceptance of the risk incurred. In the Lord Justice's opinion the workman was entitled to say: "I know I was running a great risk, and did not like it at all, but I could not afford to give up my good place, from which I get my livelihood, and I supposed that, if I was injured by their [the defendants'] carelessness, I should have an action against the company."

The difference between the Lord Chief Justice and the Lord Justice is rather as to the extent to which inquiry should be pursued than to difference in appreciating a particular point of view when determined on. The Lord Chief Justice probably never meant that the mere fact of the workman continuing in an employment after knowledge of a new risk or defect supervening was a *presumptio juris et de jure* that he was *volens*; such a meaning is inconsistent with his previous expression in *Holmes v. Clarke*, where he draws a distinction between an original risk and a supervening risk. The full force of what he says is met by considering that in the former case the fact of a workman undertaking work, even without knowledge of a danger, which is existing and apparent, would, if nothing else were shewn, throw the *onus* on the plaintiff to shew that the maxim was not applicable, and if he failed in this he would fail to prove his case; in the latter case, if the evidence, while shewing that the risk was a risk subsequent to the entry on the employment, also shewed that the workman knew of it and continued working, in the absence of anything else, the *onus* would be on the plaintiff to oust the application of the maxim by other facts; failing this the defendant would be entitled to a verdict, because the plaintiff had not proved his case. Add the facts suggested by the Lord Justice, that the workman though knowing was not willing, because he was constrained. The expressions of the Lord Chief Justice certainly do not indicate an opinion that this evidence is inadmissible; nor do those of Mellish, L.J., that it is more than an element in the case. The difference between them is that the Lord Chief Justice confines himself to certain facts and the conclusion from them; while the Lord Justice admits the possibility of more, and argues as to their effect.²

¹ *L. c.* at 393.

² Cp. the American Cases, *Laning v. New York Central Railroad Company*, 49, N. Y. 521; *Clark v. Barnes*, 37 Hun (N. Y.) 389; *Pingree v. Leyland*, 135 Mass. 398; *Russell v. Tillotson*, 140 Mass. 201.

Thomas v.
Quartermaine.

Lord Esher,
M.R.'s, con-
tention in
Yarmouth v.
France.

Lindley,
L.J.'s, view
considered.

The authority of *Thomas v. Quartermaine*¹ points in the same direction. "Mere knowledge," says Bowen, L.J., "may not be a *conclusive* defence. There may be a perception of the existence of the danger without comprehension of the risk." "There may, again, be concurrent facts which justify the inquiry whether the risk though known was really encountered voluntarily." This conclusion, whether or not the risk is really encountered voluntarily, Lord Esher, M.R., contends, in *Yarmouth v. France*,² is itself a question of fact, and, he argues, should *therefore* be left to the jury, and the failure to leave this question to them makes the decision in that case wrong. But though findings of fact must be the basis for this conclusion, it does not follow that there is a question for the jury unless there is what Lord Hatherley calls "a contest of fact."³ The finding of facts is for the jury. The conclusion from the facts is strictly one of law; therefore, where facts have been established or admitted, as to which there is no contest to warrant calling in the aid of a jury in settling them, it is for the judge to say whether the conclusion of negligence can be drawn from them or not, and if, in his opinion, on an undisputed state of facts, the inference of negligence cannot be drawn, there is no case to leave to the jury.⁴

In the case put by Lindley, L.J.:⁵ "If nothing more is proved than that the workman saw danger, reported it, but, on being told to go on, went on as before *in order to avoid dismissal*," the distinction between the workman being *sciens* and being *volens* is apparent. If the case had been one of seeing the danger, reporting it, and continuing at the work, Lindley, L.J., also says he should still regard the materials as sufficient to warrant calling

¹ 18 Q. B. Div. 685, at 696. Lord Herschell's strictures on this case, in *Smith v. Baker*, 1891, App. Cas. 325, at 365 *et seqq.*, are *obiter* merely and not involved in the decision; on the other side there is the view of Lord Morris at 368 *et seqq.* See *Law Quarterly Review* (1892), vol. viii. 202, article on *Smith v. Baker*. The elements contained in being *volens* are discussed, *Collins v. Munro*, 14 Vict. L. R. 1. In America the law has been laid down in an identical sense, that knowledge is a fact to be considered by the jury in connection with other facts in determining whether that caution was exercised that the circumstances required. *District of Columbia v. McElligott*, 117 U. S. (10 Davis) 621; *Hough v. Texas, &c. Railway Company*, 100 U. S. (10 Otto) 213, at 225.

² 19 Q. B. Div. 647, at 654.

³ In *Dublin, Wicklow, and Wexford Railway Company v. Slattery*, 3 App. Cas. 1155, at 1169. See *Wakelin v. London and South-Western Railway Company*, 12 App. Cas. 41.

⁴ *Metropolitan Railway Company v. Jackson*, 3 App. Cas. 193, at 197. The rule in America has been thus stated: "When the facts are agreed upon, or otherwise appear, what is ordinary care is a question for the Court. When the facts are in dispute the proper course for the judge is to explain what would be ordinary care under certain hypotheses as to facts, and have the jury to apply the law to the facts as they find them": *Wallace v. Western, &c. Railroad Company*, 2 Am. St. R. 346. This case, in its facts, is very like *Jackson's* case.

⁵ *Yarmouth v. France*, 19 Q. B. D. 647, at 661; *Robb v. Bullock*, 19 Rettie 971; *Greer v. Turnbull*, 19 Rettie 21; *Shields v. Murdoch*, 20 Rettie 727.

on a jury to determine whether "fear of dismissal rather than voluntary action might properly be inferred." In cases of this description it is always for the plaintiff to make out his case; and if he can only show facts equally consistent with the inference of liability or non-liability, he does not discharge the *onus* upon him. If, then, the inferences to be drawn were of equal probability, he would not have done so. The fact is, however, that in such a case as that suggested by Lindley, L.J., the inferences cannot be drawn with equal probability. The making a complaint raises a strong presumption against assuming an acceptance of the risk, which is not rebutted by the mere continuance in the employment. The presumption would seem to be rather that the continuance was in anticipation of a remedy being applied than that it was due to an acceptance of the risk, the existence of which had been brought home to the master by the complaint. There is yet a third condition of things possibly arising out of the facts suggested by the Lord Justice—if the workman sees danger and goes on as before—that is, if knowledge and nothing more be proved. The more natural inference from knowledge of a danger attending work, and a continuance in the work without protest or remark, seems to be that the workman is *volens* within the meaning of the maxim. If so, the workman does not discharge the *onus* of proof on him, and there is no case to go to a jury.

There are indeed statements scattered about in judgments and reports from which it might be argued that the case cannot be withdrawn from a jury at all, and, therefore, where knowledge and nothing beyond active continuance in the work are proved, the determination rests with the jury just as when there is a conflict of evidence. In *Thrussell v. Handyside*,¹ for example, Hawkins, J.,
in *Thrussell v.*
Handyside. where the injury sued for was caused by a defect in the scheme of work, Hawkins, J., discussing the question of the application of the maxim, *Volenti non fit injuria*, remarks, as if laying down an universal rule, "That question, as is shewn by the judgments in *Yarmouth v. France*,² was for the jury." In support of his view, however, he appealed to the recently decided case of *Membery v. Great Western Railway Company*³ as almost "identical in principle with the present case." But that decision Bowen, L.J.,
in *Membery*
v. Great
Western
Railway
Company. was, shortly afterwards, reversed in the Court of Appeal, where Bowen, L.J.,⁴ said, on the point now being considered: "If a

¹ 20 Q. B. D. 359, at 364.

² 19 Q. B. D. 647.

³ 4 Times L. R. 265, affirmed in the House of Lords, 14 App. Cas. 179. Cp. *Leary v. Boston Railroad Company*, 139 Mass. 580: if the plaintiff undertake risks unwillingly for fear of losing his place, the company is not liable.

⁴ 4 Times L. R. 504.

man voluntarily incurred a risk he could not afterwards complain. The question whether his conduct was voluntary or not was an issue of fact, but it was not always for the jury. If the evidence was all one way, it was for the judge to withdraw the case from them. If there was conflicting evidence, as if, for instance, there was evidence of compulsion, as in *Yarmouth v. France*, the question must be left to the jury." In the opinion of Bowen, L.J.,¹ then, the case of *Yarmouth v. France*, which Hawkins, J., regarded as affirming the prerogative of the jury where the maxim, *Volenti non fit injuria*, is invoked, turned on there being some evidence of compulsion for the jury to consider, and not on an universal principle that the jury are in all cases to pass their opinion on whether the plaintiff takes the risk of injury on himself. Lord Esher, M.R., was an assenting party to the decision, on the same ground, viz., that there was no evidence whatever of compulsion on the plaintiff to act as he did.

Membery v.
Great Western
Railway Com-
pany in the
House of
Lords.

In the House of Lords the judgment of the Court of Appeal in *Membery v. Great Western Railway Company*² was affirmed. The Court of Appeal had directed judgment to be entered for the defendants, on the ground that the plaintiff had acted voluntarily and with full knowledge of the danger he ran. He had been injured while himself shunting a truck without assistance. Lord Halsbury, C., said:³ "The man (the plaintiff) obviously encountered a known risk which he had encountered for a period of seven years, and therefore he is not entitled to recover, upon the ground that he was voluntarily incurring the risk—he knew that the risk existed; and further, he was himself doing the very thing which caused danger and ultimately injury to himself." That is, in the circumstances, the question was one not proper to leave to a jury.

Head-note of
Smith v. Baker
in the Law
Reports in-
correct.

The head-note of the Law Reports to the report of *Smith v. Baker*⁴ in the House of Lords contains the statement that "the question whether he (the workman) has so undertaken the risk is one of fact and not law. And this is so both at common law and in cases arising under the Employers' Liability Act, 1880." The opinions of the Law Lords in that case, however, as reported, lay down no such proposition, and, indeed, rather point to the contrary as being the rule. For instance, Lord Watson is reported as saying:⁵ "*In the circumstances of this case* the question whether he had accepted the risk is one of fact; there is no arbitrary rule of

¹ Lindley, L.J., assented: "There was no evidence of any compulsion, and in this respect the case differed from *Yarmouth v. France*."

² 14 App. Cas. 179.

³ L. c. at 186.

⁴ (1891) App. Cas. 325.

⁵ L. c. at 357.

law which decides it"; and Lord Herschell: ¹ "I find myself unable to concur in the view that this could properly be held, *under the circumstances*, as matter of law." These *dicta* clearly point to the conclusion that there may be cases where only one view is possible, which must be ruled as law by the Court without reference to the jury, but that, where the indications are ambiguous, there the facts from which the inferences of law are to be drawn are for the jury.

Where "evidence of compulsion" is given, the *onus* is changed Onus changed. and thrown upon the employer. Where there is no "evidence of compulsion," the fact of knowledge raises a presumption, though it is not conclusive. This is pointed out by Bowen, L.J., ² giving judgment in *Thomas v. Quartermaine*: "Knowledge, as we have seen, is not *conclusive* where it is consistent with the facts that, from its imperfect character or otherwise, the entire risk, though in one sense known, was not voluntarily encountered, but here, on the plain facts of the case, knowledge on the plaintiff's part can mean only one thing. For many months the plaintiff, a man of full intelligence, had seen this vat—known all about it—appreciated its danger—elected to continue working near it. It seems to me that legal language has no meaning unless it were held that knowledge such as this amounts to a voluntary encountering of the risk." That is conclusive as to the fact. Still, before a conclusive case is made out, there may be a presumptive case against the plaintiff liable to be ousted by further proof—as, for instance, by "evidence of compulsion," and this is the position in which the plaintiff seems to be placed when he shews knowledge of an added danger and continuous working with that knowledge. He has not in that event proved his case.

Osborne v. London and North-Western Railway Company ³ must be also noticed in this connection. It was a case where a railway passenger fell down a worn flight of steps and was injured; and which might apparently have been decided on the finding of fact by the county court judge "that the steps had not been properly and efficiently swept and cleaned from the caked snow, which, added to the worn condition of the steps, caused the plaintiff to fall." ⁴ The learned judge, however, who gave the leading opinion, preferred to lay down the wide proposition that "where the existence of negligence on the part of the defendants, and the absence of contributory negligence on the part of the plaintiff, are specifically found as matters of fact, if the defendants desire to succeed on the ground that the maxim, *Volenti non fit injuria*, is applicable,

Bowen, L.J.'s, statement of the working of the principle involved in the maxim *Volenti non fit injuria*.

Osborne v. London and North-Western Railway Company.

¹ *L. c.* at 366, alluding to *Thomas v. Quartermaine*.

² 18 Q. B. Div. 685, at 699.

³ 21 Q. B. D. 220. *Pinkham v. Topsfield*, 104 Mass. 83; *Jones v. Grand Trunk Railway Company*, 16 Ont. App. 37.

⁴ 21 Q. B. D. at 223.

they must obtain a finding of fact, 'that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.'"¹

Wills, J.'s,
proposition
considered.

It may be pointed out that the conditions preliminary to the application of this canon are, that the case is to go to the jury; that negligence in the defendants is to be found; and that contributory negligence must be absent. But if the defendants were negligent in the case now being considered, the maxim, *Volenti non fit injuria*, could not apply, or, rather, was nullified; and if the maxim, *Volenti non fit injuria*, applied in the particular otherwise negligent, there was no negligence; for there must have been a permission to the defendants to do as they in fact did do, or rather an acceptance by the plaintiff of the existing condition of things.² If *Volenti non fit injuria* applies, the finding of the jury that there is negligence becomes perverse, since, *ex hypothesi*, there has been none.³ The defendants' contention apparently was, that *though* the jury had found negligence there was no evidence of it, because the plaintiff was *volens*. The learned judge's ruling was, that if the jury find negligence—apparently irrespective of whether there was evidence or not to warrant the finding—the *onus* is on the defendants to shew much more than would be necessary in the ordinary case of entering an employment and taking the risks—more even than is required in the case of a risk supervening in an employment. The ground of this must be the jury finding negligence. If, then, the existence of risk is the same as negligence, there is harder measure meted out to a defendant where a timid judge, instead of nonsuiting, takes a provisional verdict, than where a strong one at once says there is no evidence. If the existence of risk and negligence are different, then, negligence being shewn, there is another cause of action, and the proposition is irrelevant.⁴

¹ Following the words of Lord Esher, M.R., in *Yarmouth v. France*. The word "agreed," as suggesting a contract in the matter, does not seem wholly apt; since the maxim *Volenti non fit injuria* is applicable where there is no contractual relation existing whatever. The facts more often indicate election than agreement.

² For example, in the United States no man can contract himself out of liability for negligence: *Railroad Company v. Lockwood*, 17 Wall. (U. S.) 357; but *Volenti non fit injuria* is the rule of law there as here: *Ladd v. New Bedford Railroad Company*, 119 Mass. 412. Lord Bramwell puts the matter with his usual clearness in *Smith v. Baker* (1891), App. Cas. 325, at 344: "In the course of the argument I said that the maxim *Volenti non fit injuria* did not apply to a case of negligence; that a person never was *volens* that he should be injured by negligence. . . . The maxim applies where, knowing the danger or risk, the man is *volens* to undertake the work." Or the point may be stated as follows: Negligence is failure to bestow the care and skill which the situation demands; therefore, if the situation does not demand it, it is not negligence to omit what is not demanded.

³ Per Bowen, L.J., *Thomas v. Quartermaine*, 18 Q. B. Div. 685, at 697.

⁴ "Negligence," says Wharton, *Negligence* (2nd ed.), § 132, "necessarily excludes a condition of mind which is capable either of designing an injury to another or of agreeing that an injury should be received from another."

In *Church v. Appleby*,¹ the Court followed *Membery v. Great Western Railway Company*, as decided in the Court of Appeal, and held "as to the man's knowledge of the danger there was no doubt, and as to his being willing to incur it, the knowledge of it and working with knowledge of it, was sufficient evidence."

The import of the maxim *Volenti non fit injuria* was elaborately considered in *Smith v. Baker* in the House of Lords.² A workman sued his employers for injuries received from a stone falling from a crane intermittently working over his head, while he was engaged in working a drill, and was thus prevented from giving attention to avoid the danger, when in the course of the work the stones lifted by the crane were swung round over his head. The jury at the trial found negligence on the part of the employer; and the point, whether or not the evidence disclosed any negligence, not having been taken in the Court below, it was held not open to the employer to contest the findings of the jury in the House of Lords. One ground of the decision of the House accordingly was that the jury having found negligence in the scheme of work the case was governed by *Sword v. Cameron*³ and the *Bartonshill Coal Company v. McGuire*.⁴

But the chief importance of the case is due to the elaborate examination of significance of the maxim *Volenti non fit injuria*. Two views were propounded: One, the view of Lord Bramwell,⁵ which was: "The maxim applies where, knowing the danger or risk, the man is *volens* to undertake the work." Lord Bramwell's meaning is further explained in *Membery v. Great Western Railway Company*,⁶ where he says: "I hold that where a man is not physically constrained, where he can at his option do a thing or not, and he does it, the maxim applies."

The other view is that which was very clearly expressed by Lord Watson as follows:⁷ "The maxim, as now used, generally imports that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform, and from which he has suffered injury. The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed, that if injury should befall him, the risk was to be his and not his master's. When, as is commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it,

¹ 5 Times L. R. 88.

² (1891) App. Cas. 325; *Brooke v. Ramsden*, 63 L. T. 287; *Wallace v. Culter Paper Mills Company*, 19 Rettie 915.

³ 3 Macq. (H. L. Sc.) 300.

⁴ 14 App. Cas. 179, at 187.

⁵ (1891) App. Cas. 325, at 344.

⁶ (1891) App. Cas. at 355. Cp. *Webster v. Foley*, 21 Can. S. C. R. 580.

Two views of the meaning of the maxim.
Lord Bramwell's view.

Lord Watson's view.

unless he knew of its existence and appreciated or had the means of appreciating its danger. But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work with such knowledge and appreciation will, in every case, necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case."

Lord Bramwell's view considered.

Lord Bramwell's formula fails in this particular case by reason of his differing from the rest of the Lords on a question of fact. In his opinion the work was "unchanged in character and was the same when the plaintiff entered the service as when he was hurt."¹ In the opinion of the other learned Lords the plaintiff was both *sciens* and *volens* as to all the danger except that arising from unfit machinery.² Assuming the correctness of Lord Bramwell's view of the facts, his formula appears to be incorrect, because it limits the means of proving the want of *voluntas* on the part of the plaintiff to one instance, viz., "physical constraint," and thus arbitrarily excludes the plaintiff from any other mode of establishing the proposition necessary to his case than by shewing that he continues working without a knowledge of the risk he encounters.

Lord Watson's view considered.

Lord Watson's view, which was substantially the one adopted by the House, is somewhat general. He emphasises the point that the mere fact of continuance at work even with knowledge and appreciation of a risk will not necessarily imply its acceptance,³ but is of opinion there is "no arbitrary rule of law" that meets the case. A consideration of the authorities, however, suggests several conclusions more special than those enunciated in *Smith v. Baker*. It is pointed out by Lord Watson that an agreement to undertake risk is valid. The chief point then is to determine the existence or not of such an agreement; and the difficulty in doing this arises where the existence of an agreement is matter of implication and is not expressly stated. Now cases like *Griffiths v. London and St. Katharine Docks Company*⁴ shew that where the risk is existing before the entering into an agreement, the *onus* is on the servant to shew his master's knowledge and his own ignorance of it. In such cases then the knowledge of the servant is presumed, and also that he is willing to undertake the risk. But where the risk is super-added to the employment the presumption is altogether different. Here there is a variation of the contract originally entered into caused by the addition of the risk. The *onus* is on the master to shew that the servant accepted the altered conditions. Proof of

¹ (1891) App. Cas. at 346.

² *L. c.* at 355.

³ Per Lord Morris, *l. c.* at 370.

⁴ 13 Q. B. Div. 259.

the original contract and of the variation from it causing injury would, unanswered, entitle the plaintiff to recover. Cross examination might elicit from the plaintiff, as indeed it did in *Smith v. Baker*, that he continued working with knowledge of the altered conditions. Then the question would be the amount and adequacy of such knowledge; and as to this, whatever the preponderating weight of evidence on the one side and the insignificance of it on the other, the opinion of a jury must be taken in accordance with the view of the majority of the House of Lords in *Dublin, Wicklow, and Wexford Railway Company v. Slattery*.¹ It is possible that the cross-examination of the plaintiff may elicit that he had full knowledge of the danger and accepted the risk. Then, in the words of Lord Hatherley in the case just cited, there is nothing "left for the jury to decide, there being no contest of

¹ 3 App. Cas. 1155. The Lord Chancellor's *dictum*, that "a person who relies on the maxim must shew a consent to the particular thing done," is at once wholly *obiter* and wholly unsound. The consent, it is obvious, cannot arise till subsequently to entering on the employment. Then it must be either to an ordinary risk of the employment, or to what is not an ordinary risk. If the former, then the plaintiff has undertaken it by the terms of his employment. *Priestley v. Fowler*, 3 M. & W. 1; *Griffiths v. London and St. Katharine Docks Company*, 13 Q. B. Div. 259. If the latter, the risk is not within the terms of the agreement. The plaintiff can recover as a stranger. The Lord Chancellor apparently had not present to his mind the remarks of Lord Abinger in *Priestley v. Fowler*, beginning, "The footman, therefore, who rides behind the carriage may have an action against his master for a defect in the carriage owing to the negligence of the coachmaker, or for a defect in the harness arising from the negligence of the harnessmaker," and the whole list of absurdities there enumerated; which are plainly "particular things," as to which, apart from the legal implications of the incidents of the service, the master would be unable to shew the servant's "consent." Lord Herschell in *Smith v. Baker* (1891), App. Cas. 325, at 361, observes: "There may be cases in which a workman would be precluded from recovering even though the risk which led to the disaster resulted from the employer's negligence. If, for example, the inevitable consequence of the employed discharging his duty would obviously be to occasion him personal injury, it may be that if with this knowledge he continued to perform his work and thus sustained the foreseen injury, he could not maintain an action to recover damages in respect of it." Lord Herschell's cautious "it may be" seems somewhat unnecessary, for a case where, according to its statement, the *causa causans* is the free choice or negligence of the injured party, who seeing an "inevitable consequence" in certain circumstances, provides the necessary antecedents to bring it about, or in the words of Lord Halsbury, C., at 338: "The essential cause of the risk is the act of the complaining plaintiff himself," or, as the same noble Lord expresses it, in *Membery v. Great Western Railway Company*, 14 App. Cas. 179, at 184: "It is almost reducing the thing to an absurdity by the mere statement of the proposition. Not only does the man voluntarily do the thing, but the phrase 'contributory negligence' is a very inadequate statement of the facts. The thing done is done by himself; he does not contribute to it, but he does it." The rule as stated by Lord Watson in *Smith v. Baker* (1891) App. Cas. at 357, seems more useful and accurate. "If he (the servant) clearly foresaw the likelihood of such a result (consequent injury from defect in a machine which the servant has engaged to work), and, notwithstanding, continued to work, I think that according to the authorities he ought to be regarded as *volens*." Lord Morris, at 369, adopts Bowen, L.J.'s, statement of the law in *Thomas v. Quartermaine* as "clear and conclusive." A better example of the operation of the maxim *Volenti non fit injuria* than that imagined by Lord Herschell was the subject of actual decision in the Supreme Court of the United States in *Bunt v. Sierra Butte Gold Mining Company*, 138 U. S. (31 Davis) 483. An action was brought by a miner for injuries caused by the falling upon him of the roof of a tunnel in which he was working. The miner, knowing the roof was shattered and dangerous, assisted in removing a supporting timber, and before another was substituted, sat down to rest under the place whence the timber had been removed. He was held not entitled to recover in respect of the injury thus received.

fact.”¹ But except in this possibility the matter must be left to the jury.

II. In what circumstances the maxim *Volenti non fit injuria* applies in the case of a violation of a statutory obligation.

II. VOLENTI NON FIT INJURIA AS MODIFIED BY STATUTORY OBLIGATION.

We now come to consider the case of a man working at a dangerous employment, where there is a statutory obligation on the master to take precautions, and which precautions are neglected. Whether the precautions are neglected contemporaneously with the employment or subsequently will not determine this case; since there is the independent obligation imposed on the master by State authority to afford protection. Thus, by the Factory Act, 1878,² a penalty is imposed on the employer for neglect of the provisions of the Act with regard to fencing, enforceable under the criminal law, and independent of all agreements or consents whatever.

Where duty to the State violated.

In a case of this sort, where the State imposes a duty, and annexes a penalty to the violation of it, a presumption is raised, on grounds of public policy, if for no other reason, that the employer who violates his duty to the State has not discharged his duty to his workpeople, rather than a presumption that, because a workman continues at work in illegal circumstances, even with knowledge of them, he must be taken to waive their effect upon him; or, to state the matter in another way, criminal negligence on the part of the master is more consistent with a neglect of civil duty to his workman than with the existence of an agreement between master and workman to avoid the obligation of the law. This view is in accordance with the weight of authority.

Coe v. Platt.

In the earliest case³ dealing with the fencing clauses of the Factory Act, 1844,⁴ Parke, B., said:⁵ “Though its main object may have been to afford security to children and young persons, who are more likely to sustain injury than others; yet there is a positive enactment that in all factories within the interpretation clause, when any part of the machinery is used for any manufacturing process it shall be securely fenced; consequently, if any person

¹ 3 App. Cas. at 1169, quoted and approved by Lord Watson in *Wakelin v. London and South-Western Railway Company*, 12 App. Cas. 41, at 48.

² 41 & 42 Vict. c. 16. This Act is extended by 54 & 55 Vict. c. 75, ss. 6, 37.

³ *Coe v. Platt*, 6 Ex. 752, 7 Ex. 460 and 923. This case, which was in arrest of judgment, turned on the point whether the declaration should allege that the machinery was in motion *for some manufacturing* process, and not allege that it was in motion simply. This was decided affirmatively.

⁴ 7 & 8 Vict. c. 15, rep. 41 & 42 Vict. c. 16, s. 107, which was amended by 46 & 47 Vict. c. 53, and by 54 & 55 Vict. c. 75, ss. 6, 37. See *Creevy v. Hannay's Patents Company*, 16 Rettie 993, as to the precautions to be adopted in whitelead works; also what is “whitelead” under the Act of 1878.

⁵ 6 Ex. at 757.

sustains an injury through the violation of this enactment, he has a right to bring an action.'¹

The point, however, was most canvassed in the well-known case of *Holmes v. Clarke*,² though with no certain result. In the Court of Exchequer,³ Pollock, C.B., laid down the law as follows: "Where machinery is required by Act of Parliament to be protected so as to guard against danger to persons working it, if a servant enters into the employment when the machinery is in a state of safety, and continues in the service after it has become dangerous in consequence of the protection being decayed or withdrawn, but complains of the want of protection, and the master promises to restore it, but fails to do so, we think he is guilty of negligence, and that if any accident occurs to the servant he is responsible." Holmes v. Clarke.
Opinion of Pollock, C.B.

The proposition of the Chief Baron seems to be sedulously narrowed down to comprehend no more than the facts of the case on which he was giving judgment. The actual assertion of the duty, in favour of the servant, to fence machinery required by Act of Parliament to be protected is limited to those cases: (1) where it actually was so protected at the entry of the servant into the service; (2) where complaint is made of its deteriorated condition; (3) where the master has promised to restore it and fails to do so. Even this narrow proposition did not commend itself to some of the judges in the Exchequer Chamber. Cockburn, C.J., thought the proposition that the plaintiff could take advantage of the statutory requirements "open to considerable doubt owing to the plaintiff being an adult," and decided the case on the ground that the defendant was guilty of negligence independent of statute. He was followed by Compton, Byles, and Keating, J.J.⁴ Wightman, J., expressly reserved his assent to the reasoning of the Chief Justice, and said: "I attribute more importance to the statutory obligation than has been put upon it by my lord." Willes, J., merely expressed concurrence. Considered.

The distinction between a statutory and a common law liability was pointed out in *Britton v. Great Western Cotton Company*.⁵ Bramwell, B., having expressed his inability to "follow the reasoning of some of the judges in the Exchequer Chamber" in *Holmes v. Clarke*, proceeded to consider the applicability of the Distinction between a statutory liability and a common law liability, as pointed out in *Britton v. Great Western Cotton Company*.

¹ See *Doel v. Sheppard*, 5 E. & B. 856, where it was held, that "all mill-gearing, while in motion for a manufacturing purpose, is to be fenced." Cp. *Britton v. Great Western Cotton Company*, L. R. 7 Ex. 130.

² 6 H. & N. 349, 7 H. & N. 937. The Law Journal Report of the case in the Ex. Ch., 31 L. J. Ex. 356, is the better, as it contains, *inter alia*, some important remarks by Wightman, J., which had the sanction of Willes, J., and which are not in the other reports.

³ 6 H. & N. 349, at 358.

⁴ 31 L. J. Ex. at 359.

⁵ (1872) L. R. 7 Ex. 130, at 136. *Robb v. Bulloch*, 19 Rettie 971; *Shields v. Murdoch*, 20 Rettie 727.

maxim Volenti non fit injuria :¹ "The jury have found him [the deceased] not guilty of contributory negligence either in going or being there [*i.e.*, where there was unfenced machinery which there was a statutory duty to fence], and I cannot say they were wrong. I do not myself see that the place was necessarily dangerous. At any rate, the deceased may well have thought it was not. Indeed, the accident seems to have resulted, not from the necessarily dangerous character of the place, but from some misfortune which might have happened anywhere. It is further contended that, at any rate, the deceased knew the danger as well as his employers. That may be doubtful in fact, for he seems not to have been a skilled workman, but a coal trimmer. Assuming, however, that he did share his employers' knowledge, it must be remembered that the liability of the defendants is not at common law, but by statute. They are in default to begin with, and the mere circumstance that the deceased entered on a dangerous employment does not exonerate them, unless he knew the nature of the risk to which, in consequence of that default, he was exposed." The report of this judgment is somewhat different in the Law Journal.² In that report the sentence last extracted reads as follows: "Here the plaintiff is not placed in the dilemma which arises when the action is for a breach of a duty at common law. That dilemma is this—either the danger was obvious or it was not. If obvious, the servant must have known it as well as the employer; if it was not obvious, there was no negligence in the employer. That dilemma is not in the plaintiff's way here, for the duty is a statutory one. If the deceased dispensed with the performance of it knowing the duty and knowing the danger, I think he would be *volens*, but not otherwise." The rest of the Court agreed.

Report in the
Law Journal.

Judgment
criticized.

There is, perhaps, a want of precision in some of these expressions. It is manifest that a distinction is drawn between the common law liability and the statutory liability. The statutory obligation imposed is not of such a nature that in no event can it be waived by the servant—so far, that is, as his own rights under it are concerned, since Bramwell, B., recognizes the servant's ability to dispense "with the performance of it knowing the duty and knowing the danger."³ In the case of the ordinary law he is, with similar circumstances, presumed to do this; but the statutory obligation displaces "the dilemma which arises when the action is for a breach of a duty at common law." The difference pointed at seems, therefore, to be that, by the common law, working with circumstances of knowledge of the danger lets

Conclusion.

¹ L. R. 7 Ex. at 137.

² 41 L. J. Ex. 99, at 101.

³ *Cp. Winch v. Conservators of the Thames*, L. R. 9 C. P. 378, at 389.

in the presumption *Volenti non fit injuria*; while in the case of the statutory obligation, the *onus* remains on the master, and he has to prove, in addition to knowledge of the risk, that, as a matter of fact, the servant has dispensed with the performance of the master's statutory duty, with a knowledge of what the duty dispensed with is and what the danger involved is.

The distinction between breach of duty at common law and the breach of a statutory duty is touched on by Bowen, L.J., in his masterly judgment in *Thomas v. Quartermaine*.¹ "It is plain," he says, "that mere knowledge may not be a conclusive defence. There may be a perception of the existence of the danger without comprehension of the risk; as where the workman is of imperfect intelligence, or, though he knows the danger, remains imperfectly informed as to its nature and extent. There may again be concurrent facts which justify the inquiry whether the risk though known was really encountered voluntarily. The injured person may have had a statutory right to protection, as where an Act of Parliament requires machinery to be fenced. The case of *Clarke v. Holmes* is a case of that sort, and has been so explained subsequently by judges of authority." "The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of a danger which, but for a breach of duty on his own part, would not exist at all." Fry, L.J., in the same case, also alludes to the distinction:² "Knowledge is not, of itself, conclusive of the voluntary character of the plaintiff's actions; there are cases in which the duty of the master exists independently of the servant's knowledge, as when there is a statutory obligation to fence machinery."³

Bowen, L.J., in *Thomas v. Quartermaine*, on the effect of knowledge of danger.

Fry, L.J., in *Thomas v. Quartermaine*, on the effect of knowledge of danger.

Conclusion.

Wills, J., in *Baddeley v. Earl Granville*.

Baddeley v. Earl Granville.

The reasonable conclusion from these *dicta* is that, where a statutory duty exists, the maxim *Volenti non fit injuria* is not to be presumed to avail, or, as Wills, J., says in his judgment in *Baddeley v. Earl Granville*,⁴ "would not apply" at all where the injury arose from a direct breach by the defendant of a statutory obligation."

In *Baddeley v. Earl Granville*, through breach of a statutory duty imposed by the Coal Mines Regulation Act, 1872,⁵ the plaintiff's husband was killed; and, in an action under the Employers' Liability Act, 1880, it was held that the maxim *Volenti non fit injuria* was not applicable, where the injury was from the breach of a statutory duty on the part of the employer. It should be pointed

¹ 18 Q. B. Div. 685, at 696.

² *L. c.* at 703.

³ The Irish Ex. Ch. had expressed this conclusion very clearly some seventeen years previously in *Hoey v. Dublin and Belfast Junction Railway Company*, 5 Ir. R. C. L. 206.

⁴ 19 Q. B. D. 423, at 426.

⁵ *I.e.*, *prima facie*.

⁶ 35 & 36 Vict. c. 76, rep. 50 & 51 Vict. c. 58, s. 84.

out that, on the facts of the case, the defendant was liable in any event ; since, a statutory duty being shewn to exist and to have been neglected, the defendant had not "dispensed with the performance of it" within the meaning of Bramwell, B., in *Britton v. Great Western Cotton Company*,¹ and therefore the decision is sustainable quite independently of the actual leading reason alleged for it.²

Thompson v.
Wright.

In the Ontario case of *Thompson v. Wright*,³ Boyd, C., discussing the effect of a failure to guard dangerous machinery within the provisions of the Ontario Factory Act, describes the failure as "*per se* evidence of negligence"; and in the Scotch case of *Kelly*

Kelly v. Glebe
Sugar Refining
Company.

v. Glebe Sugar Refining Company,⁴ the protection of the Factory Acts, 1878 and 1891, was held to extend to every person employed in the factory ; so that there is no necessity that, at the time of the happening of an accident, the injured person should be actually engaged in the performance of his duty. In the words of Lord Adam :⁵ "The result is that the owners of the factory are in fault for not having this shaft securely fenced, and are *prima facie* liable in damages for the consequences of that fault, for I cannot adopt the view that their liability is limited to the penalty imposed by the statute for neglect of its provisions. I think that the neglect of the statutory provisions creates a *prima facie* case of fault against the factory owners which will render them liable in damages to their employees who may have been injured through that fault."

Results as to
Volenti non fit
injuria.

The results, so far as they relate to the application of the maxim *Volenti non fit injuria*, may be summed up in three propositions—

1. Where the risk is plain and apparent at the time of entering on the employment, the presumption of law is, that the workman enters on the employment on the terms of encountering the risk, even though, in fact, he has no knowledge of it.

2. Where the risk is superadded after the commencement of the employment, the presumption of law is, that the workman does not undertake the work subject to the risk, till it appears that he has actual knowledge and a full appreciation, and has continued in his employment, so knowing and appreciating of the risk ; and not

¹ 41 L. J. Ex. 99, at 102.

² The reasoning of the judgment in *Baddeley v. Earl Granville* is minutely examined in an article in the *Law Mag.* (1887, 4th series), vol. xiii. 19.

³ 22 Ont. R. 127. See *M'Cloherly v. Gale Manufacturing Company*, per Osler, J.A. 19 Ont. App. 117, the case of a woman's hair caught by an unguarded revolving horizontal shaft which passed through the room near the ceiling and in front of a window she was opening when she was caught and injured.

⁴ 20 Rettie 833.

⁵ L. c. at 835.

even then if his continuance in the employment is explained by other circumstances—*e.g.*, a promise to remove the danger.¹

3. When the master is under a statutory liability to take precautions in any particular work, the presumption of law is that, as between the master and the workman, the fact of the workman working in the absence of the statutory safeguards does not discharge the master from his liability to compensate the workman for injuries sustained through the master's neglect to provide the statutory safeguards; and this presumption can only be rebutted by clear proof of an undertaking of the employment by the workman with a knowledge of the risk involved, and of the master's duty in respect thereof.²

We have, while investigating the nature of a statutory duty, in effect though incidentally, investigated the question whether a workman can definitely contract to undertake risks, and in what circumstances. This we have found he can do, unless he is prohibited by any statute.³ And he is prohibited when a penalty is imposed for doing or omitting the act which is the subject of legislation;⁴ he is not prohibited where an Act of Parliament makes a contract for him, and does not in doing so impose a general rule of conduct, but confines itself to presuming a benefit for either an individual or a class.⁵

In what circumstances a workman can contract to undertake risks.

IV. THE DUTY OF THE MASTER TO THE SERVANT WITH REGARD TO THE EMPLOYMENT OF FELLOW-SERVANTS.

The legal expression of this duty was first formulated by Alderson, B., in *Hutchinson v. York, Newcastle, and Berwick Railway Company*, as follows:⁶ "The servant, when he engages to run the risks of his service, including those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from such risks by associating him only with persons of ordinary skill and care." The rule was more definitely specified in *Tarrant v. Webb*⁷ to be that "the master *may* be responsible where he is personally guilty of negligence; but certainly not where he does his best to get competent

IV. Duty of the master to the servant with regard to the employment of fellow-servants.

Hutchinson v. York, Newcastle, and Berwick Railway Company.

Tarrant v. Webb.

¹ *Smith v. Baker*, 1891, App. Cas. 325. *Ante*, 767. There is a manifest difference between continuing to work with knowledge of a danger without complaint, and after complaint pending the application of a promised remedy: see *ante*, 753.

² *Thomas v. Quartermaine*, 18 Q. B. Div. 685, *ante*, 745, 770. For the law in the United States see *Kohn v. M'Nulta*, 147 U. S. (40 Davis) 238; *Union Pacific Railway Company v. McDonald*, 152 U. S. (45 Davis) 262.

³ *Redpath v. Allan*, L. R. 4 P. C. 511.

⁴ *In re Cork and Youghal Railway Company*, L. R. 4 Ch. 748, per Lord Hatherley, C., at 758.

⁵ *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357; and the cases cited *ante*, 778. See *post*, 874, note.

⁶ (1850) 5 Ex. 343, at 353. *Deverill v. Grand Trunk Railway Company*, 25 Upp. Can. Q. B. 517.

⁷ (1856) 18 C. B. 797, per Jervis, C.J., at 804.

persons. He is not bound to warrant their competency.”¹ In that case the judge had directed the jury that, “if they were of opinion that the scaffolding was erected under the personal direction and interference of the defendant, and was insufficient, *or*, that the person employed by the defendant for the purpose of erecting it was an incompetent person, the plaintiff was entitled to recover.” This was held a misdirection, as failing to point out that the defendant might have used every possible care, and yet the servant he had selected might turn out incompetent; in which case the injured servant could not recover. *Tarrant v. Webb* was recognized as rightly decided in *Wilson v. Merry*, where the Lord Chancellor (Cairns) says:² “Negligence cannot exist if the master does his best to engage competent persons; he cannot warrant the competency of his servants.”

Potts v. Port Carlisle Dock and Railway Company.

Statement of the law by Cockburn, C.J.

The rule of law is considered in *Potts v. Port Carlisle Dock and Railway Company*.³ There an accident was caused by the breaking of a turn-table, originally defectively constructed. Cockburn, C.J., said: “In order to establish the liability of the defendants and to sustain this action, it is necessary that the plaintiff should make out, not only that the turn-table was so defective in its construction as to shew that there had been negligence somewhere, but also that the defendants had been guilty of negligence in this—that they had not used due care in employing competent persons to do the work. Negligence on the part of the person employed is not sufficient; there must also be negligence on the part of the employers. If the plaintiff had given evidence of the incompetence of the persons employed to construct this turn-table, she would have been entitled to recover damages in this action; or if she had shewn that the turn-table was grossly defective, and that the defect was so clear and apparent as unmistakably to lead to the inference that an incompetent person had been employed in its construction, she would in that case also have been able to sustain this action.”⁴ The law as thus laid down, in so far as it

Criticized.

¹ Cp. *Potts v. Plunkett*, 9 Ir. C. L. R. 290.

² (1860) L. R. 1 Sc. App. 326, at 332.

³ 8 W. R. 524, 2 L. T. (N.S.), 283. The Law Times report of this case is the fuller, while that in the Weekly Reporter is clearer. The head-note in the Weekly Reporter runs: “In order to render a master liable for an injury to his servant caused by the breaking of a machine belonging to the master, it is not sufficient to shew that the machine was defectively constructed, but there must be evidence that the master employed incompetent persons to construct the machine.” This is putting the master’s duty much too high. His duty is no more than to use reasonable care to employ competent servants. If after that they prove incompetent, the master is not liable. See the argument in *Brown v. Accrington Cotton Company*, 3 H. & C. 511.

⁴ This sentence in the Law Times’ report reads thus: “If the negligence of companies is to be deduced from the badness of the work itself, then the plaintiff must shew that the accident arose from the clear negligence of the defendant; if she can shew the work was so grossly bad, then I am quite willing to admit that it may not be necessary to call evidence of negligence.”

imports that when the plaintiff has given evidence of the incompetency of a servant he is entitled to recovery without further evidence, is inconsistent both with the earlier and also with the later cases, and is clearly not law. As was pointed out in *Tarrant v. Webb*,¹ it is quite consistent with the master using every care that the servant may, notwithstanding, prove incompetent; and, even though the servant be incompetent, if the master have used all reasonable care in his selection he is not liable. Two facts have to be established—(1) incompetency of the servant, and (2) want of care on the master's part; and proof of neither, singly, is enough.²

This is illustrated by *Smith v. Howard*.³ A boy was engaged by the defendant's foreman; complaint was made of his incompetence to the foreman; subsequently to which complaint an accident happened, in respect of which an action was brought, alleging the incompetence of the boy as the cause. The claim was held unsustainable; for if the ground of action was the incompetency of the servant, it must be shewn that the foreman, and not the boy merely, was incompetent; otherwise the case was merely that of the negligence of a fellow-servant in employing an incompetent boy. A master is not bound to the personal selection of the servant he employs: if he makes all reasonable provision for the selection of competent servants, his duty is discharged, even though, through the negligence of his deputy, the provision in any case may prove inadequate.

Smith v. Howard.

Law in America.

This does not appear to be the law in the United States; for example, in *Laning v. New York Central Railroad Company*⁴ it was decided that the duty of the master is not discharged by the appointment of a competent superintendent where that superintendent places by the side of a servant another who is unskilled and incompetent. And in *Chicago, Milwaukee and St. Paul Railway Company v. Ross*⁵ in the Supreme Court of the United States, it was held by four judges against four, that there is "a clear distinction to be made in their relation to their common principal, between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed

Chicago, Milwaukee and St. Paul Railway Company v. Ross.

¹ 18 C. B. 797, at 804.

² "It is said that the person appointed to examine the materials was selected because he was gatekeeper, and that he is therefore presumably incompetent. I should rather infer that he was made gatekeeper because he had been selected to examine the materials; but, at all events, there was no evidence that he was incompetent, or, even if he was, that there was any negligence in the defendants personally": per Wightman, J., *Ormond v. Holland*, E. B. & E. 102, at 104.

³ (1870) 22 L. T. (N. S.) 130.

⁴ 49 N. Y. 521, at 533.

⁵ 112 U. S. (5 Davis) 377, at 390. "A conductor," it is said, in continuation of the passage in the text, "having the entire control and management of a railway train, occupies a very different position from the brakeman, the porters and other subordinates employed." This case has, however, been "explained and distinguished" in *Baltimore and Ohio Railroad Company v. Baugh*, 149 U. S. (42 Davis) 368, at 379.

Lord Cairns's
statement of
the law
in *Wilson v.*
Merry.

Onus changed
on proof of
the incom-
petency of
the servant.

Conflict of
opinion.

Better opinion.

with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence." The case of *Randall v. Baltimore and Ohio Railroad Company*¹ was cited as binding on the Court and in consonance with the true rule. The Court, notwithstanding this, limited the exemption claimed to those cases where the fellow-servants are engaged in the same department and act under the same immediate direction, and held that "within the reason and principle of the doctrine only such servants can be considered as are engaged in the same common employment" in that restricted meaning of the words which excludes the workers in different departments.² That this is not the law in England, and that the law is in accordance with the decision in *Smith v. Howard* appears from Lord Cairns's statement of the law in *Wilson v. Merry*:³ "In the event of his—i.e., the employer's—not personally superintending and directing the work, [he] is bound to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master."

On proof of the incompetency of the servant—that is, of the servant responsible for competency, as illustrated by the last case, the *onus* of proof is changed. For proof of incompetency of the servant is *prima facie* evidence of want of care on the part of the master in selecting him; and the fact that requisite care has been exercised lying peculiarly within the knowledge of the master, there is no injustice to him, when the servant is shewn to be incompetent, to call on him to shew that he exercised due care in his selection.⁴ On the other hand, it has been said that, as the negligence is the not taking due care to employ a competent servant, the burden of proving the whole proposition on which the negligence depends lies on the party asserting it.

The better opinion seems to be that "When it is shewn that a servant is incompetent, and that through his incompetency injury results to his fellow-servant, the mere fact of his incompetency throws the *onus* on the master of shewing that he exercised due and reasonable care in selecting him, and in the absence of such evidence justifies the question

¹ 109 U. S. (2 Davis) 478.

² 112 U. S. (5 Davis) 377, at 389.

³ L. R. 1 Sc. App. 326, at 332.

⁴ *Murphy v. Pollock*, 15 Ir. C. L. R. 224; *Culman v. Eastern Railroad Corporation*, 92 Mass. 233. The case of *Wanstall v. Pooley*, 6 Cl. & F. 910, n., shews "that the employment of a tipsy man was an act of negligence"; but it does not throw light on the proposition in the text, for on other grounds the master was clearly liable for the negligence of his servant whereby a stranger was injured. See *Kean v. Detroit Rolling Mills*, 11 Am. St. R. 492, as to liability for employment of drunken foreman; also *Baltimore and Ohio Railroad Company v. Baugh*, 149 U. S. (42 Davis) 368, at 384.

of negligence in the master being left to the jury."¹ This was the course adopted in *Edwards v. London and Brighton Railway Company*,² where evidence having been given that deceased was a person of inferior grade, and the work he was employed on required skill, evidence to rebut this was at once given, without putting the plaintiff to prove independently the want of care in the appointment. It seems doubtful, notwithstanding, whether this can be laid down as a rule of law. It is clear that incompetency may be so gross and palpable that it may raise an irresistible presumption of negligence in the appointment of the incompetent person; it is equally true that incompetency, as undoubted and as harmful, may be so disguised that its existence is quite consistent with a due care on the part of the master. The result seems to be that the question in each case is for the judge, whether the proof given of incompetency is sufficient to raise a presumption of want of due and reasonable care in the selection of the servant; for the jury whether it does.³

There remains to consider what is sufficient evidence of incompetency to affect the master. In *M'Carthy v. British Shipowners' Company*,⁴ Dowse, B., thus states the law: "It is not true, as a general proposition of law, that all negligence is evidence of incompetency. It may, I admit, in some cases be evidence of incompetency; but I think that sometimes the most competent people are the most negligent, whether out of carelessness, or temper, or negligence in the real sense of the word. I say, therefore, that it is not correct to assume that all negligence is evidence of incompetency."

That in some circumstances a single act of negligence may be sufficient is pointed out by Fitzgerald, B.,⁵ and quoted with approval by Palles, C.B., in *Skerritt v. Scallan*.⁶ Fitzgerald, B., said: "I can conceive that, even the single act of a man may be evidence—nay, satisfactory evidence—of incompetency; but it seems to me that this is where the act is of such a nature, or done under circumstances such that the doing of it may be reasonably thought only accountable for on the supposition of malice, which is not to be presumed, or incompetency." It should be pointed out that, in the case of malice the master would not be liable in any event.⁷ Fitzgerald, B., then goes on to deal with a difficult

¹ Per Palles, C.B., *Skerritt v. Scallan*, Ir. R. 11 C. L. 389, at 401. See per Dowse, B., *Swift v. Macken*, Ir. R. 8 C. L. 140, at 141.

² 4 F. & F. 530.

³ *Metropolitan Railway Company v. Jackson*, 3 App. Cas. 193.

⁴ 10 L. R. Ir. 384, at 392.

⁵ *Murphy v. Pollock*, 15 Ir. C. L. R. 224, at 232.

⁶ Ir. R. 11 C. L. 389, at 400. *Harvey v. New York Central Railroad Company*, 88 N. Y. 481.

⁷ *Croft v. Alison*, 4 B. & Ald. 590, and the cases following it.

point. "Assuming, however, that a reasonable man might, from this single instance, reasonably infer want of ordinary skill and care in Linehan, will incompetence thus inferred from a single act in a man, as to whose conduct on other occasions there is no evidence, be itself evidence from which a reasonable man can infer want of reasonable care on the master's part in selecting him, or knowledge of his incompetence? I cannot go this length."

General rule.

The result of this is that, as a general rule, several acts of negligence are requisite to shew incompetency; and where one act of negligence is of a character to raise a presumption of negligence, the Court will not hold that sufficient to raise also the presumption of want of due care on the part of the master in the selection of the servant. This conclusion is not satisfactory; for the single act of negligence which is sufficient to warrant a conclusion of incompetency may sometimes be of such a character as to argue no less powerfully want of due care and skill on the part of a master. For instance, an act of the servant, shewing palpable ignorance of the elements of the work he is employed at, would probably be sufficient to raise the presumption of incompetency from a single act. It is difficult to see why in such a case the general rule of law, which holds that it is some evidence from which a jury might draw the inference of want of due care and skill in the employment of the servant, should be displaced where the circumstances argue strongly that the fact of incompetence so gross could have been detected had the master used the least care or trouble. The correct rule seems to be that if the conclusion from the single fact is consistent with care or want of care, then additional evidence should be given; if it is consistent only with the hypothesis of want of care, the circumstance that the hypothesis arises from a single fact only is, if not positively irrelevant, at least insignificant.¹

Rule suggested.

Analogy with the law as to machinery.

When the incompetency of the servant is established, the law differs nothing from that which is applicable to machinery tackle. The obligation of the master is to see that machinery is reasonably sufficient. So, too, with servants; still there may be a waiver by conduct on the part of the servant of his right to suitable machinery or competent fellow-servants. In both cases the allegation that the servant had knowledge is not sufficient; for as knowledge of defective machinery may be consistent with a reasonable belief that the master would remedy it, and the servant's continuance in the work may be only on this assumption;² so with incompetent servants, the plaintiff may have knowledge of their incompetence; and this, though evidence to disentitle him from recovering, is not in

¹ *Avery v. Bowden*, 6 E. & B. 953, at 974, cited by Wightman, J., in *MacMahon v. Lennard*, 6 H. L. C. 970, at 993.

² *Clarke v. Holmes*, 6 H. & N. 349, 7 H. & N. 937.

itself a complete legal answer to the claim ; for knowledge may be consistent with many circumstances that warranted the plaintiff continuing in the employment.¹

The degree of diligence required of a master in the selection of a servant has been considered in the United States. On the one hand it was sought to prescribe an unelastic standard, on the other, one variable with the particular exigencies. The latter view has been adopted, and may also be taken to correctly express the English law. "Ordinary care," it was said, "in the selection and retention of servants and agents implies that degree of diligence and precaution which the exigencies of the particular service reasonably require. It is such care as in view of the consequences that may result from negligence on the part of employes is fairly commensurate with the perils or dangers likely to be encountered."²

The rule in the United States.

In another case³ evidence of the reputation of the servant was tendered as evidence that would bind the master where the servant's incompetency was notorious in the neighbourhood. The evidence was admitted "to shew that the master would have found out that the servant was incompetent if proper means had been taken to ascertain the qualifications of the servant." "We cannot say," the Court added, "that it may not be a matter of common repute in a community that a man is physically weak and is partially blind and deaf."⁴

V. MASTER'S DUTY TO YOUNG PERSONS IN HIS EMPLOYMENT.

V. Duty to young persons.

We have considered so far the duty owing to servants who are adults. A different and greater duty is owing by the master to young persons. The principles by which this is fixed have been already treated of in connection with the general principle regulating contributory negligence.⁵ The extent of the master's duty remains shortly to be illustrated.

The leading statement of this is Cockburn, C.J.'s, at *Nisi Prius*, in *Grizzle v. Frost*:⁶ "I am of opinion that if the owners of

Cockburn, C.J.'s, statement of the law in *Grizzle v. Frost*.

¹ *Hoey v. Dublin and Belfast Junction Railway Company* (1870), 5 Ir. R. C. L. 206. See for the American cases, *Wabash, &c. Railroad Company v. McDaniels*, 107 U. S. (7 Otto) 454.

² *Wabash Railway Company v. McDaniels*, 107 U. S. (17 Otto) 454, at 460.

³ *Monahan v. Worcester*, 150 Mass. 439, 15 Am. St. R. 226.

⁴ In *Gilman v. Eastern Railroad Company*, 95 Mass. 433, the accident in respect of which the action was brought was caused by the negligence of an habitual drunkard. Evidence of reputation was held admissible to shew that his intemperate habits ought to have been known to the officers of the corporation. *Flynn v. M'Gaw*, 18 Bettie 554, is a decision "only on relevancy."

⁵ *Ante*, 182-203.

⁶ (1863) 3 F. & F. 622, at 625. In Canada the employment of a child under twelve to work an elevator for the uses of a manufacturing concern is made illegal by the Canadian Factories Act, and, therefore, beyond the mere penalty imposed the employer

dangerous machinery, by their foreman, employ a young person about it quite inexperienced in its use, either without proper directions as to its use or with directions which are improper and which are likely to lead to danger, of which the young person is not aware, and of which they are aware; as it is their duty to take reasonable care to avert such danger, they are responsible for any injury which may ensue from the use of such machinery."

Common law
rule con-
sidered.

At common law there does not appear to be any disability on the employment of young children; the ordinary rule of law that when a workman is employed on any work he is presumed to undertake only such risks of the employment as are plain and apparent ordinarily to a person in his position of life, would, however, afford no small protection in the case of young children to whom risks are plain and apparent in a much less degree than in the case of adults, and to whom consequently the common law affords an ampler protection in proportion as naturally they are less able to protect themselves.

Bartonshill
Coal Company
v. McGuire.

This is touched on by Lord Chelmsford in *Bartonshill Coal Company v. McGuire*.¹ Commenting on a Scotch case of *O'Byrne v. Burn*,² and pointing out that it was hardly possible to apply the principle of the servant having undertaken the service with a knowledge of the risks incident to it, since "she was an inexperienced girl employed in a hazardous manufactory, placed under the control, and it may be added the protection of an overseer who was appointed by the defender and intrusted with this duty, and it might well be considered that by employing such a helpless and ignorant child the master contracted to keep her out of harm's way in assigning to her any work to be performed." Lord Cranworth,³ glancing at the same point, suggests that the rule of common service is modified to the extent of holding that children are not engaged in the common work with the superintendent. "It may be that if a master employs inexperienced workmen, and directs them to act under the superintendence and to obey the orders of a deputy whom he puts in his place, they are not, within the meaning of the rule in question, employed in a common work with the superintendent." This departure from the general rule might, perhaps, be better stated as a principle that an overseer or superintendent of work has additional duties cast upon him if he employs inexperienced persons, which duties arise from such persons' incapacity to protect their own interests, and are measured

has to exercise more than ordinary precaution for the wellbeing and safeguarding of children who have been put to work contrary to legislative prohibition. *O'Brien v. Sandford*, 22 Ont. R. 136.

¹ 3 Macq. (H. L. Sc.) 311.

² (1854) 16 Dunlop 1025.

³ *Bartonshill Coal Company v. Reid*, 3 Macq. (H. L. Sc.) 266, at 294, 295.

by the extent of their incapacity and inexperience ; since it is not the scheme of work that is altered, but the mutual relations of those engaged in it.

The contention that an additional duty is thrown on the master by the employment of children and young persons, and that the extent of the additional obligation is measured by their presumed incapacity, is borne out by the Scotch case of *Gemmill v. Gourrock Rope Work Company*,¹ where it was held that the particular machinery described in the case should have been fenced as against children or young persons. This, as a decision that such an obligation actually exists, is stronger than the earlier case of *O'Byrne v. Burn*² and the contemporaneous case of *M'Millan v. M'Millan* ;³ which two cases, though pointing in the same direction, go no further than to hold that the allegation of a greater duty towards an inexperienced child is not demurrable.

*Gemmill v.
Gourrock.*

The English case of *Murphy v. Smith*⁴ has sometimes been cited for a contrary view. The facts must be looked at to explain the decision. A boy engaged in making lucifer matches interfered in a part of the work that he had no business to, and which was dangerous ; an explosion took place through the meddling, and the boy was injured. A man, not a foreman, standing by, did not interfere, and was so far guilty of negligence in permitting an inexperienced person to act thus. The man was morally negligent in letting the boy injure himself ; the point for consideration was whether he was under any legal duty to interfere so that his neglect to do so was binding on the common employer. The Court assumed that had he been a foreman the employer would have been liable, and thus recognized the distinction that is set up on behalf of inexperienced persons. As the man was not foreman, but only a fellow-workman, they held there was no liability on the employer. It should be noted that the boy was not employed on the work, and there was no evidence that any direction was given to him in the matter, or that he was doing anything else than intermeddling. Had a liability been imposed in this case, it would have indicated a great extension of the master's liability beyond any alleged in previous cases, and would moreover, have, in effect, prohibited the employment of inexperienced workmen on dangerous work except on onerous terms, and have asserted the existence of an obligation not to employ them where they would be able to injure themselves by interfering with dangerous work.

*Murphy v.
Smith.*

In *Traill v. Small and Boase*,⁵ the Second Division of the Court of Session held that "the pursuer, being under fourteen and engaged

Traill v. Small.

¹ 23 Dunlop 425.

² 23 Dunlop 1082.

³ 16 Dunlop 1025.

⁴ (1865) 19 C. B. N. S. 361.

⁵ (1873) 11 Macph. 888.

Darby v.
Duncan.

at the time" (*i.e.*, of an accident by which he lost his arm) "in his ordinary occupation, had not liberated the defenders from their responsibility" by acting in a way which, in the case of an ordinary workman, would have been contributory negligence. The decision expressly avoids saying that a boy under fourteen cannot be guilty of contributory negligence, nor yet does it say there is a different rule for those under fourteen years of age from those older. It considered the pursuer's youth as an element in the evidence on which it decided—that is, that the duty of the employer was increased by reason of employing youthful work-people. Again, the Court of Session, in *Darby v. Duncan*,¹ held the master liable where a machine, not, indeed, defective in itself, though incapable from its very nature from being used in an unfenced state without danger to life and limb, was left without due and sufficient fencing; the proposition as laid down is broad and without qualification; in the case in question the injured person was a boy of thirteen; and, further, Lord Deas, appears to have decided on the authority of *O'Byrne v. Burn*,² which turned entirely on the inexperience of the plaintiff; so that this case should, it is submitted, be similarly limited, and at least goes to prove the existence of the rule in circumstances now being considered.

American
decision.

A United States case in the Supreme Court, *Union Pacific Railroad Company v. Fort*,³ throws considerable light on this subject. A boy, sixteen years of age, was ordered by the person under whose superintendence he was working to do dangerous work not within the scope of his employment, but within that of the superintendent's. While obeying, he was injured. The contract for the boy's service was made by the father with the company. The Court held that "the father had the right to presume when he made the contract of service that the company would not expose his son to such a peril [*i.e.*, dangerous work]. Indeed, it is not possible to conceive that the contract would have been made at all if the father had supposed that his son would have been ordered to do so hazardous a thing. If the order had been given to a person of mature years, who had not engaged to do such work, although enjoyed to obey the directions of his superior, it might with some plausibility be argued that he should have disobeyed it, as he must have known that its execution was attended with danger. Or, at any rate, if he chose to obey, that he took upon himself the risks incident to the service. But

¹ (1861) 23 Dunlop 529. The decision of the First Division of the Court of Session in *M'Millan v. M'Millan*, 23 Dunlop 1082, turned mainly on the facts that should be brought before the jury.

² 16 Dunlop 1026.

³ 17 Wall. (U. S.) 553, at 558.

this boy occupied a very different position. How could he be expected to know the peril of the undertaking? He was a mere youth, without experience, and not familiar with machinery. *Not being able to judge for himself*, he had a right to rely on the judgment of the foreman."

The ground taken in this decision seems a sound one. If Considered. persons employ young children in dangerous surroundings, they must take means to safeguard them. To keep a mischievous boy out of danger is very probably an impossible task.¹ Whether it be so or not there is a duty to keep a watchful eye upon him and only to allow him contact with dangerous machinery after giving him strong cautions. The duty alleged in *Murphy v. Smith*² that all grown men in the master's service should use active means of restraining a boy from meddling with dangerous matters goes further than the law provides. Notwithstanding this, the master's duty towards boys is more extensive than it is towards adults, and is similar in kind to that which he has to adults with regard to the safety and efficiency of the methods and appliances of working, and is very much greater in degree.

In *Bunker v. Midland Railway Company*,³ a boy of fifteen was Bunker v. Midland Railway Company. injured through obeying an order of a foreman which the boy knew the foreman was not empowered to give. The action was brought under the Employers' Liability Act, 1880,⁴ and was decided under sub-section 3 of section 1 of that Act, on the ground that the boy was not "bound to conform" to the order of the foreman. If the rule laid down in the American case is a just one, the boy had a common law right of action, on the ground of the constraint put upon him by the foreman's position and authority, and his "right to rely on the judgment" of the superintendent. This does not seem to have been suggested.

The tendency of some of the later English cases is strongly in Crocker v. Banks. the direction of the American rule. Thus, in *Crocker v. Banks*⁵ the Court of Appeal adopted the rule that a greater duty is owing from the master to young persons in his employment than to adults. A girl of *seventeen* was injured by the bursting of a soda-water bottle while she was engaged in filling it as part of her duty in the employment of a soda-water manufacturer. "There was on the machine an automatic guard during the period of filling and corking the bottles, but when it became necessary to take the bottle from the machine that guard dropped and the operator was

¹ *Ante*, 102 note, 603.

² 19 C. B. N. S. 361.

³ 47 L. T. 476. *Marley v. Osborn*, 10 Times L. R. 388.

⁴ 43 & 44 Vict. c. 42.

⁵ 4 Times L. R. 324 (C.A.). *O'Brien v. Sandford*, 22 Ont. R. 136, *Milligan v. Muir*, 19 Rettie 18.

unprotected." Then a mask was provided, which the girl did not use. Lord Esher, M.R.'s, remark is: "The fact that the defendant provided masks for all at this time was strong evidence that he knew of the danger which then existed." The girl—who was described as an "expert hand"—swore that she did not know of the danger against which the mask was provided. Lord Esher, M.R., said: "It was not negligent for a girl of *her age* to omit to put on the mask if she did not know that she was bound to do so at that period of the operation." The Court sustained the verdict of the jury in favour of the plaintiff.¹

Nash v.
Cunard Steam-
ship Company.

The duty of a foreman in giving orders was considered in *Nash v. Cunard Steamship Company*,² where an accident had happened, as was alleged, through the plaintiff conforming to an order of the foreman. The judge at the trial directed the jury that if the foreman at the time of giving the order "thought everything was perfectly clear, then he would not be guilty of negligence." The Court of Appeal held this a misdirection, considering the test to depend "not upon what he thought, but upon what he ought to have thought."³

General formula of the duty owed by the master to the servant.

As to the general formula for the duty owed by the master to the servant, there are two ways in which it has been expressed. One is that the master is bound to exercise the general average care and skill used in similar employments. The other, that the degree of care ordinarily exercised is not necessarily due and proper care; that due care must be independently determined by the jury with special reference to the circumstances of time and place, and by considerations not limited to the practice of any particular calling but by reference to the ordinary habits and safeguards in working of the community at large.⁴ This latter seems the preferable way of looking at the question.⁵

Indemnity of servants by master.

The master is bound to indemnify the servant from the consequences of obedience to his orders. It is obvious that if the servant acts contrary to his master's orders, and is thereby exposed to liability, he must himself bear the loss.⁶ Again, though the general relation between the master and servant may subsist to render the master liable to indemnify the servant, it is necessary that the relation should exist in that particular matter in which the servant is damnified. If the Legislature imposes

¹ The Scotch Courts seem disposed to take a more exacting view of the intelligence of a "boy of sixteen" than the English Court of Appeal of a "girl of seventeen," which Lord Esher, M.R., describes as a "tender age:" *Forbes v. Aberdeen Harbour Commissioners*, 15 Rottie 323.

² 7 Times L. R. 597 (C.A.).

³ Per Lindley, L.J., 7 Times L. R. at 598.

⁴ See *Wabash, &c. Railway Company v. McDaniels*, 107 U. S. (17 Otto) 454, at 461.

⁵ *Smith v. Baker* (1891), App. Cas. 325.

⁶ *Grylls v. Davies*, 2 B. & Ad. 514.

duties on a special class of servants, their masters are not liable to indemnify them for acts done in the discharge of the duty thus imposed. For example, sewer men might have imposed on them duties to report to the Local Government Board, or to a county council, certain particulars as to the sewers which they are employed by the local sanitary authority, to attend to. In the event of the discharge of their statutory duty bringing them loss, they could not claim indemnity from the local sanitary authority, for the relation of master and servant would not *ex hypothesi* exist. This principle is of importance in regard to relieving officers and others, on whom, apart from contract and without reference to their employers, the Legislature has imposed duties.¹ A servant, however, may do an illegal act at the bidding of his master and still be entitled to indemnify; yet such act must not be "palpably illegal," and, moreover, must be "done honestly in discharge of the directions of the master," while the servant must neither know nor have "reasonable ground for believing that that which he did was wrongful."²

In *Scarman v. Castell*,³ Lord Kenyon held that an apothecary might recover from a master the amount of a bill for medicine and attendance furnished to and bestowed on his servant. Subsequently, in *Wennall v. Adney*,⁴ it was considered "that the humanity of Lord Kenyon misled him,"⁵ and the law, as laid down in that case, has since been accepted, viz., that a master is not liable upon an implied assumpsit to pay for medical attendance on a servant who has met with an accident in his service.

Scarman v. Castell dissented in *Wennall v. Adney*.

¹ *Ante* 288, and *post*, Medical Men, *sub fin.*

² Macdonell, *Master and Servant*, 177.

³ 1 Esp. (N. P.) 270.

⁴ 3 B. & P. 247. See *Sellen v. Norman*, 4 C. & P. 80. In *Watson v. Turner*, Bull. N. P. 147, it was adjudged that the overseers of the poor are bound to provide medical attendance for the poor, under the Poor Law Acts.

⁵ Per Heath, J., 3 B. & P. 253.

CHAPTER V.

DISABILITIES OF THE SERVANT AT COMMON LAW TO RECOVER FOR INJURIES RECEIVED IN THE COURSE OF HIS EMPLOYMENT.

Rule of law,
*Culpa tenet suos
auctores
tantum.*

*Respondent
superior* an
exception
to it.

THERE is no general rule making one man liable for the negligence of another. The rule of law is the other way, *Culpa tenet suos auctores tantum*.¹ To this law there has long been an exception established—that the master must answer for the act of his servants when strangers are injured thereby. This exception we have already considered.² It is referred to the maxim of agency, *Qui facit per alium facit per se*, and the legal conclusion is, *Respondent superior*—where the existence of the relation of master and servant is established, the master is to answer for acts done by the servant within the sphere of the agency; and, on grounds of policy, not merely for those authorized by him, but sometimes even for those actually forbidden, where the position of servant prompts the wrongful act, and not merely affords opportunity for it. In addition, we have considered certain aspects of the rule, *Culpa tenet suos auctores tantum*, as it extends to make the master liable for his own personal negligence whereby those in his employment are injured. We have seen that the master is liable to his servants for his own personal negligence in the actual performance of work, or for failure to provide appliances for the proper carrying on the work, or for default in the appointment of competent servants.

Master's
liability to his
servant for his
servant in the
same business
an exception
to this.

We are now to consider a further exception grafted on the rule of *Respondent superior*, itself an exception to the wider rule, *Culpa tenet suos auctores tantum*, that the master is not liable to his servants for injuries to them produced by the negligence of a fellow-servant engaged in the same business, provided there be no negligence in the appointment of such negligent servant, or in the retention of such servant after notice of his incompetency.³

¹ *Woodhead v. Gartness Mineral Company*, 4 Rettie 469; also per Bramwell, L.J., Evidence before House of Commons' Committee on Employers' Liability for Injuries to their Servants, Parliamentary Papers, 1887, vol. x. quest. 1100. ² *Ante*, 686 *et seqq.*

³ Wharton, Negligence (2nd ed.), § 224; and the cases cited in the notes.

The ground of this exemption has been much canvassed. On the one hand it has been said to arise from an implied contract that the workman should take the risk of the employment; one of which risks is the danger of sustaining injury from workmen engaged in the same scheme of labour. On the other hand, it is said that the workman is not entitled to recover from the master, because he had not contracted to be indemnified; and, therefore, that the original rule of law, *Culpa tenet suos auctores tantum* remains unaffected.¹ Whichever explanation is adopted, the germ of the law laying down the master's immunity from liability in the case of injury caused by a servant to a servant is traced no higher up than the case of *Priestley v. Fowler*,² decided in 1837.

The ground
of the
exception.

Priestley v. Fowler was a decision given on motion to arrest judgment, *non obstante veredicto*, and thus, as was pointed out in *Wigmore v. Jay*,³ was a decision of the greater authority, since, as the question was raised on the record, it might, had the decision been doubtful, have been taken to the Exchequer Chamber. The declaration set out that the defendant was a butcher who directed the plaintiff, his servant, to take goods in a van with another servant; that it was the duty of the defendant to see that the van was in a proper state of repair, and not overloaded; nevertheless, the defendant did not use proper care that the van should be in a sufficient state of repair, or that it should not be overloaded, or that the plaintiff should be safely and securely carried; in consequence of which neglects the van gave way, and the plaintiff was injured.

Priestley v.
Fowler.

¹ Evidence of Bramwell and Brett, L.JJ., before House of Commons' Committee on Employers' Liability, Parliamentary Papers, 1877, vol. x. quests. 1100, 1919.

² (1837) 3 M. & W. 1. Brett, L.J., says: "I think it may be suggested that the law as to the non-liability of masters with regard to fellow-servants arose principally from the ingenuity of Lord Abinger in suggesting analogies in the case of *Priestley v. Fowler*": Evidence before House of Commons' Committee on Employers' Liability, Parliamentary Papers, 1877, vol. x. quest. 1919. The actually first decision on the precise point is alleged to be *Murray v. South Carolina Railroad Company*, 1 McMullan 385, in 1841. See *Chicago, Milwaukee, and St. Paul Railway Company v. Ross*, 112 U. S. (5 Davis) 377, per Field, J., at 384.

³ 5 Ex. 354, at 358. Brett, L.J., in his evidence before the House of Commons' Committee on the Employers' Liability for Injuries to their Servants, Parliamentary Papers, 1877, vol. x. at quest. 1922, says: *Priestley v. Fowler* "is one of those unsatisfactory cases in which, under the old system, the question did not arise upon what were the real facts, but upon how they were stated on the record; which meant that, although the proof at the trial might even have gone somewhat beyond the declaration, the question was, whether the declaration itself was good when you came to look at it." This remark may be of the greatest force as applied to the difficulty of doing substantial justice in the particular case, as apart from justice in a technical conformity to rule; but as a means of eliciting a definite rule of law, it would appear better calculated to reach its end, as the facts are necessarily definitely formulated, than where the facts are to be collected in a less precise and accurate form. "The case of *Priestley* was decided on a general view of mixed facts; the causes of the accident being: (1) defect in the waggon; (2) overloading; and (3) careless driving; and the Court held that, as the servant injured knew the waggon, and knew of the loading, he was as well able to judge of the risk as the master could be:" per Lord Justice-Clerk (Moncreiff), *Gregory v. Hill*, 8 Macph. 282, at 285.

Objection to
the declaration.

The Court of Exchequer directed judgment to be arrested, after verdict for the plaintiff, on the ground that the declaration disclosed no legal liability; since from the mere relation of master and servant no contract, and therefore no duty, could be implied on the part of the master to cause the servant to be safely and securely carried; or to make the master liable for damage to the servant arising from any vice or imperfection unknown to the master in the carriage, or in the mode of loading and conducting it.

Lord Abinger's
judgment.

"The mere relation of the master and the servant," said Lord Abinger, C.B.,¹ "never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant, in the course of his employment, to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master."

Suggested
grounds of
decision.

It has been suggested that the injury in this case was occasioned either through a want of care in loading the van or through a defect in the van itself. If the former, the decision might be justified on the ground that it was the duty of the servant to see that the van was not more than properly loaded; which duty he neglected, and was in consequence injured through his own contributory negligence. In that view no principle of law had to be applied in any new sense. Or, secondly, assuming that the servant had nothing to do with the overloading the van, the case might still be sustained on the principle that the master was not bound to warrant the van, and he was not shewn to be guilty of any negligence in providing it for the work. Parke, B., however, one of the Court in *Priestley v. Fowler*, remarking on that case in giving judgment in *Metcalf v. Hetherington*,² said: "The Court considered the allegation of duty as altogether insufficient, the declaration not stating facts from which duty could be inferred." This being so, the decision goes the full length of asserting that there is no duty on a master to see that the van is in a sufficient state of repair and not overloaded, or that the plaintiff is safely and securely carried; and that the workman must be bound to undertake the work in just the state it is, without implying any obligations on the master in respect of its safety.

The question of the effect of knowledge by the defendant of a

¹ 3 M. & W., at 6.

² 11 Ex. 257, at 270.

defect is not raised ; and the Court expressly avoid any expression of opinion upon it, their decision being confined to cases where the servant must be taken to know as well as his master the condition of the work on which he is engaged.

Neither is the case any authority—as has sometimes been stated—for the proposition that the master is liable for personal neglect. The decision merely enunciates the broad proposition—if Parke, B.'s, explanation of it is to be taken as authoritative—that there is no duty implied by law, in certain cases, for the master to take those precautions for the safety of his servant that he would be bound to take with regard to strangers.

Proposition established by Priestley v. Fowler.

As to the analogies with which Lord Abinger illustrated his judgment, they are very loose and inaccurate: “For instance, all those *dicta* about a negligent chambermaid and a negligent cook and so on are quite equally applicable to the relation between innkeeper and guest, and most of his remarks are equally applicable to the relation between carrier and passenger, and there is no reason why they should apply exclusively to the relation between master and servant.”¹

Lord Abinger's illustrations.

In any view, the legal relationship of fellow-servants as affecting their employer is not raised ; since the case does not even suggest that the defendant had another servant than the plaintiff. The broad proposition that can be founded on the case is no more than that the rights of servants against their masters are not identical with the rights of strangers in the case of suffering personal injury.

The question of the legal relationship of fellow-servants not raised.

The next case in order of date, *Farwell v. Boston and Worcester Railroad Corporation*,² though not strictly binding on the English courts, has so often been mentioned with approbation by the English courts, and more particularly by the law Lords in the case of *Bartonshill Colliery Company v. Reid*,³ that it must take a place in the history of the English decisions.

Farwell v. Boston and Worcester Railroad Corporation.

“Two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for

¹ Mr. C. P. Ilbert, Evidence before House of Commons' Committee on Employers' Liability, Parliamentary Papers, 1876, vol. ix. quest. 282: “The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him in a damp bed ; for that of the upholsterer for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself ; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen ; of the butcher in supplying the family with meat of a quality injurious to the health ; of the builder for a defect in the foundations of the house, whereby it fell, and injured both the master and the servant by the ruins.” What Lord Abinger in 1837 regarded as *reductiones ad absurdum* of an alleged state of law, in 1894 are regarded (The Employers' Liability Bill, 1893) as necessary incidents of any tolerable law.

² 45 Mass. (4 Met.) 49 ; printed also 3 Macq. (H. L. Sc.) 316.

³ 3 Macq. (H. L. Sc.) 316.

hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose, that of the safe and rapid transmission of the trains ; and they are paid for their respective services according to the nature of their respective duties, and the labour and skill required for their proper performance. The question is, whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer." ¹ This question the Court answered in the negative.

The case, it will be observed, raises a somewhat different question from that in *Priestley v. Fowler*. In *Priestley v. Fowler* the plaintiff actively undertook the risk, and had full knowledge of all the circumstances which constituted it ; accordingly, in *Farwell v. Boston and Worcester Railway Corporation* counsel for the plaintiff admitted that *Priestley v. Fowler* was rightly decided, although he questioned several of the expressions used in the judgment. But in *Farwell v. Boston and Worcester Railroad Company* the servants, though employed by the same company, were *to perform separate duties*, though tending to the accomplishment of the same purpose.

Judgment of
Shaw, C.J.,
summarized.

The reasoning of the Court is as follows : Where a servant injures a stranger in the course of his employment, and acting within the scope of his authority, the master is liable in a civil action. Where, however, the servant is injured in the course of his employment, and while acting within the scope of his authority, this does not apply ; for the risks and perils the servant and the employer respectively intend to assume may be regulated by express or implied contract between them. Thus, the maxim of *Respondent superior*, which binds the master to indemnify a stranger for damage caused by acts of the servant done in fulfilling his service, does not cover the case of injury done to a servant in the course of his employment. As there is no contract expressed, the right of the servant to recover must depend on an implied contract of indemnity. Now the authorities shew no such implication, and are to that extent against the contention.

Principle
involved.

To turn to the question of principle. The perils to which a servant is exposed are such as, being equally apparent to him and his master, are, in addition, perils incident to the service, and the happening of which may be averted by care and forethought. To say that the master should be liable because the acts are caused by his agent is the very point to be proved. Servants are agents to some extent and for some purposes, but whether the master is responsible

¹ Per Shaw, C.J., delivering the judgment of the Court.

in a particular case is not decided by the single fact that they are for some purposes his agents.

With fellow-servants it has been urged that each is an observer of the conduct of others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrongdoer.

It is then objected that the principle applies only where servants are employed in the same department of duty. Such a rule would vary in each case. What is to constitute a department? What a distinct department of duty? Further, the reason of the rule is not that the servant has better means of providing for his safety, but that the *implied contract* does not extend to indemnify the servant against the negligence of any one except himself; and there is no tort, as the relation is regulated by contract.

This case, therefore, may be cited as the first reasoned development of the proposition that, where a master uses due diligence in the selection of servants, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another while both are engaged in the same service.

In 1850, the two cases of *Hutchinson v. York, Newcastle, and Berwick Railway Company*¹ and *Wigmore v. Jay*² were decided on the same day in the Court of Exchequer. They were both actions brought under Lord Campbell's Act³ for deaths caused by the negligence of fellow-servants in the course of their duty.

Hutchinson v. York, Newcastle, and Berwick Railway Company.
Wigmore v. Jay.

In *Priestley v. Fowler*⁴ the element of negligence of one servant causing danger to another was entirely absent. The question there was, whether duty of the master to his servant in providing machinery or appliances for the carrying on his work by his servant was the same as, or different from, what it was with regard to strangers. The present cases raised the same question as in *Farwell v. Boston and Worcester Railroad Corporation*; to which the facts in *Hutchinson v. York, Newcastle, and Berwick Railway Company*¹ were not dissimilar. The Court, after consideration, held that there was no distinction in principle between the

¹ 5 Ex. 343.

² 5 Ex. 354.

³ 9 & 10 Vict. c. 93.

⁴ 3 M. & W. 1.

Judgment of
Alderson, B.

case of an injury occasioned to one servant, while discharging his duty by the negligence of another servant, in the discharge of his duty, and the case of *Priestley v. Fowler*. The rule and the reasons for it were thus enunciated by Alderson, B.,¹ "The difficulty is as to the principle applicable to the case of several servants employed by the same master and injury resulting to one of them from the negligence of another. In such a case, however, we are of opinion that the master is not in general responsible, when he has selected persons of competent care and skill." "They have both engaged in a common service, the duties of which impose a certain risk on each of them; and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant and not of his master. He knew, when he engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow-servant; and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk." "The principle is, that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant whenever he is acting in discharge of his duty as servant of him who is the common master of both."

Scotch decisions follow
a different
course from
the English.

The English cases² that immediately succeeded the decision of *Hutchinson v. York, Newcastle, and Berwick Railway Company*, dealt more with the question of what risks are to be held incident to the service than with the relationship between servants in the same employment with reference to their masters and the class of questions more immediately arising out of this relationship. In Scotland there was a series of decisions which shewed a very strong disposition on the part of the Scotch judges to strike out an independent course.³ The law of the two countries was, however, declared to be identical in two cases carried up to the House of Lords and there very carefully and deliberately considered.

Bartonshill
Coal Company
v. Reid.
Bartonshill
Coal Company
v. McGuire.

Bartonshill Coal Company v. Reid,⁴ and *Bartonshill Coal Company v. McGuire*⁵ arose out of the same facts. The former was heard before Lord Chancellor Cranworth, sitting as the sole law Lord; the latter was heard two years afterwards before Lord

¹ 5 Ex. 343, at 350.

² *E.g.*, *Seymour v. Maddox*, 16 Q. B. 326; *Skipp v. Eastern Counties Railway Company*, 9 Ex. 223; *Couch v. Steel*, 3 E. & B. 402.

³ *E.g.*, *Dixon v. Rankin*, 14 Dunlop 420; *Gray v. Brassey*, 15 Dunlop 135; *Baird v. Addie*, 16 Dunlop 490; *Brownlie v. Tennant*, 16 Dunlop 998; *O'Byrne v. Burn*, 16 Dunlop 1025.

⁴ (1856) 3 Macq. (H. L. Sc.) 266; *Randall v. Baltimore and Ohio Railroad Company* 109 U.S. (2 Davis) 478.

⁵ (1858) 3 Macq. (H. L. Sc.) 300.

Chancellor Chelmsford, and Lords Brougham and Cranworth. Judgment was given in both cases on the same day. The accident which resulted in the death of two miners, whose widows were respectively pursuers in the cases, was caused by the negligence of a competent workman in drawing them up from the pit in which they had been working; in consequence of which negligence the cage in which they were being drawn up was upset, and they were thrown out and killed. The Scotch judges held a direction that, if the jury were satisfied on the evidence that the injury was caused by the culpable negligence and fault of the person having the management of the machinery, the defendants were in law liable, to be correct. The appellants contended that, in so directing, the judge at the trial was wrong, and said the proper direction was, if the jury were satisfied on the evidence that the defendants used due and reasonable diligence in the selection of the workman, and that the workman was fully qualified for his work and furnished with proper machinery, then the defenders were not liable for his carelessness.

Facts.

Decision of Scotch Courts.

Appellants' contention.

It was not alleged that the machinery was other than sufficient, and the workman generally competent; and the claim of the pursuers was rested entirely on the liability of the appellants, the defenders, for the fault of their workman.

The opinion of Lord Cranworth is a masterly analysis of this branch of the law.

Lord Cranworth's opinion.

The general rule is, that where an injury is occasioned to any one by the negligence of another, if the person injured seeks to charge with its consequences any person other than the actual wrongdoer, it lies on the person injured to shew that the circumstances are such as to make some other person responsible. In general it is sufficient to shew that the wrongdoer is acting in the course of his employment as a servant, when the maxim, *Respondeat superior*, applies, and the master is responsible.

General rule of the law.

An exception is, however, found in the case of workmen injured by the want of care of other workmen in the same employment.

Exception.

But when a master employs a servant in a work of danger he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks.

Again, the master may be responsible for a defective system of working which does not adequately protect the workman. A further limitation is, that the servant injured and the servant injuring must be employed on the same work.—If, for example, a gentleman's coachman were to drive over his gamekeeper, the

master would be just as responsible as if the coachman had driven over a stranger.¹

Inexperienced
workmen.

And, lastly, it may be that if a master employs inexperienced workmen, and directs them to act under the superintendence and obey the orders of a deputy, they are not, within the meaning of the rule, employed in a common work with the superintendent.

Workmen
employed in
the same
work.

To constitute employment on the same work, it is not necessary that the workman causing, and the workman sustaining, the injury should be engaged in performing the same, or similar, acts. "The driver and the guard of a stage-coach, the steersman and the rowers of a boat, the workman who draws the red-hot iron from the forge, and those who hammer it into shape, the engine-man who conducts a train, and the man who regulates the switches or the signals, are all engaged in a common work. And so in this case. The man who lets the miners down into the mine . . . and afterwards brings them up . . . is certainly engaged in a common work with the miners themselves."²

Suggested
test of common
employment
by Lord
Chelmsford.

Lords Chelmsford and Brougham assented to the opinion of Lord Cranworth. Lord Chelmsford suggests for a test of common employment, the consideration of what the servant must have known or expected to have been involved in the service which he undertakes; all such risks as these he undertakes by his contract.³

Common
employment.

Bartonshill Coal Company v. Reid was the starting-point of a number of decisions, the general effect of which is indefinitely to extend the application of the term "common employment"; which rapidly came to cover the most dissimilar occupations. Thus it was decided that a labourer is the fellow-servant with an engine-driver,⁴ a third engineer with a chief engineer,⁵ a ganger of platelayers with the guard of a train,⁶ a platelayer with one whose duty it was to assist in pushing the trucks,⁷ a scaffolder with a builder's

¹ I am under the impression that the illustration is Bramwell, L. J.'s; I have, however, mislaid the reference. The principle is illustrated by a curious American case, *Gannon v. Housatonic Railroad Company*, 17 Am. R. 82, where, on a bill of exceptions, it was contended in the Supreme Court of Massachusetts, that a husband could not recover for consequential damage sustained by the wife while travelling on the husband's employers' line of railway. The argument that sought to maintain the position admitted that the wife could recover for damage received to herself, and even conceded she might, though the injuries were caused by the negligence of her husband, but urged that the obligation on the servant was to protect the master's business, so far as care and diligence could, from liabilities incident to his business. The Court, however, adhered to the English rule, that the servant is only precluded from an action against the master in the case of "those direct injuries to which he is exposed in the course of his employment."

² 3 Macq. (H. L. Sc.) at 295.

³ 3 Macq. (H. L. Sc.) at 308. See *The Petrel* (1893), P. 320.

⁴ *M'Eniry v. Waterford and Kilkenny Railway Company* (1858), 8 Ir. C. L. R. 312.

⁵ *Searle v. Lindsay* (1861), 11 C. B. N. S. 429.

⁶ *Waller v. South-Eastern Railway Company* (1863), 2 H. & C. 102.

⁷ *Lovegrove v. London, Brighton, and South Coast Railway Company* (1864), 16, C. B. N. S. 669.

manager,¹ a miner with an underlooker of the mine,² the manager of a lucifer manufactory with a boy about sixteen years of age engaged in the manufactory,³ a carpenter engaged in mending the roof of a station with the men engaged in shifting a locomotive engine on a turn-table in the station,⁴ a labourer employed by a railway company in loading waggons with ballast and the guard of a train by which he was returning from his work,⁵ a workman in the employment of a maker of locomotive engines with the foreman of the workshop,⁶ a railway labourer with an inspector,⁷ an engine-driver with labourer uncoupling waggons,⁸ and the porter and carpenter with the stewardess of a steam-vessel.⁹

The tendency of these decisions is strongly towards including all grades of service, to the very highest, within the principle of non-liability in the case of common employment. In several of the cases allusion was made to a possible exception in the case of an *alter ego*, or vice-principal; yet in none were the prescribed constituents met;¹⁰ till the possibility of such a case existing was set at rest by the decision in *Wilson v. Merry*."

*Wilson v. Merry*¹¹ was the complete development of the principle adopted in *Bartonshill Coal Company v. Reid*. That case may be regarded as giving the ultimate judicial sanction to the position that one of the incidents of a common employment is the undertaking all the risks known or involved in the service. It was not necessary there to define who were fellow-servants within the application of the rule. Such a definition had, however, to be given in the case of *Wilson v. Merry*, where the negligence was imputable to the pit manager.

The pursuer raised her action as mother of Henry Wilson, whose

¹ *Gallagher v. Piper*, 16 C. B. N. S. 669.

² *Hall v. Johnson*, 3 H. & C. 589.

³ *Murphy v. Smith* (1865), 19 C. B. N. S. 361. In this case Erle, C. J. seemed to think that if the negligent manager were a "vice-principal of the factory," common employment would not have existed. The point was taken that the boy was of tender years and the employer could not shift his duty to safeguard him. No decision was given as to this.

⁴ *Morgan v. Vale of Neath Railway Company* (1864), L. R. 1 Q. B. 149.

⁵ *Tunney v. Midland Railway Company* (1865) L. R. 1 C. P. 291.

⁶ *Feltham v. England* (1866), L. R. 3 Q. C. 33.

⁷ *Macfarlane v. Caledonian Railway Company* (1867), 6 Macph. 102.

⁸ *Robertson v. Linlithgow Oil Company, Limited*, 18 Rettie 1221.

⁹ *Quebec Shipping Company v. Merchant*, 133 U. S. (26 Davis) 375. On the other hand, for what are not common employments, see the judgment of Morse, J., *Coots v. Detroit*, 43 N. W. Rep. 17, set out in *Jones on the Negligence of Municipal Corporations*, § 170 n². Where a firm of coopers engaged a contractor to load goods for them, and the coopers' men helped, the two classes of workmen were held not in common employment in *Smyth v. Turnbull*, 17 Rettie 877. In *The Petrel* (1893), P. 320, the crews of two steamships belonging to the same owners which came into collision, were held not in a common employment so as to be disentitled to recover the one for the negligence of the other.

¹⁰ See especially *Feltham v. England*, L. R. 2 Q. B. 33.

¹¹ (1868) L. R. 1 Sc. App. 326. See *Wright v. Dunlop*, 20 Rettie 363.

death was caused by an explosion of fire-damp, which blew up a scaffold or platform whereon the deceased was working at the time. The explosion was the result of the faulty construction of a scaffold, no sufficient provision being made for the passage of air upwards. The person who ordered the erection of the scaffold was the pit manager; the persons who actually constructed it were the underground manager and a miner. The work was finished before the deceased was engaged at the mine. The explosion happened immediately after he began to work.

Lord Ormisdale's direction to the jury.

The jury were charged that if they were satisfied on the evidence that the arrangement or system of ventilation in the pit at the time of the accident had been designed and completed by the pit manager before the deceased was engaged to work in the pit, and that the defendants had delegated to the pit manager their whole power, authority, and duty in regard to that matter, and also in regard generally to all underground operations, without control or interference on their part, the deceased and the pit manager did not stand in the relation of fellow-workmen engaged in the same common employment. The jury found for the pursuer.

Held inadequate in the Court of Session and in the House of Lords.

Common employment described by Lord Cairns, C.

The Court of Session granted a new trial on the ground of misdirection. The pursuer then appealed to the House of Lords; which upheld the decision of the Court of Session.

Lord Cairns, C., thus indicates the constituents of a common employment:¹ "What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer, in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen." Lord Cranworth said:² "Workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority. Lord Colonsay added:³ The terms "fellow-workmen" and "collaborateurs" "are not expressions well suited to indicate the relation on which the liability or non-liability of a master depends, especially with reference to the great systems of organization that now exist. And these expressions, if taken in a strict or limited sense, are calculated

By Lord Colonsay.

¹ L. R. 1 Sc. App. 326, at 332.

² L. c. at 334.

³ L. c. at 34.

to mislead. The same may be said of such words as 'foreman' or 'manager.' We must look to the functions the party discharges, and his position in the organism of the force employed, and of which he forms a constituent part. Nor is it of any consequence that the position he occupies in such organism implies some special authority, or duty, or charge, for that is of the essence of such organizations."

The effect of this decision was: "First, to reject the view that the foreman might be considered the delegate of his employer, or that the question of his position might be left to the jury; secondly, to enforce the wide meaning which the English judges had given to the term 'common employment'; "and, lastly, to place the doctrine of the master's immunity on broader grounds, and to shew that the true criterion is, not whether the person causing, and the person suffering from, the accident are fellow-workmen in any strict sense of the word, but whether the damage was within the risk incident to the service undertaken for reward; that is to say, the rule is based, not on the phrase 'common employment,' but on the meaning of the contract; on the terms expressed or implied in the contract between the employer and the person employed."¹

Effect of the
decision
summarized.

A "common employment" is thus defined in an American case:² "All who are engaged in accomplishing the ultimate purpose in view" "must be regarded as engaged in the same general business within the meaning of the rule." To make this a strictly accurate guide in practice, some stricter limitations than those suggested by the phrase "engaged in accomplishing" seem advisable; since in its present form the definition covers all the different stages of a manufacture carried on, not only at different times and places, but also under several independent controls; whereas the fundamental notion to be expressed is, co-operation under one control.

Definition in
an American
case.

A question not decided in terms in *Wilson v. Merry*, came up for decision in *Howells v. Landore Siemens Steel Company, Limited*.³ There it was conceded in argument that the liability of

Howells
Landore
Siemens Steel
Company.

¹ Evidence of Mr. C. P. Ilbert before the House of Commons' Committee on Employers' Liability, Parliamentary Papers 1876, vol. ix. quest. 296.

² *Hard v. Vermont and Canada Railway Company*, 32 Vt. 473, cited *Shearman and Redfield, Negligence* (4th ed.), § 239, note 3.

³ (1874) L. R. 10 Q. B. 62. In *Conway v. Belfast and Northern Counties Railway Company* Ir. R. 9 C. L. 498, at 501 (n), the report of this case in 44 L. J. Q. B. 25 is noticed as being "a materially different report of the case from that in the Law Reports." This, on examination, does not appear to be so. The Law Journal report is very much shorter, but to precisely the same effect as the Law Report. From that report it would seem that the very point of the distinction between a manager and an *alter ego* was taken. The effect of the act is to make the manager a principal, and not a servant under the control of the owner. Lord Watson, in *Johnson v. Lindsay*, (1891), App. Cas. 371, at 387, adopts "the compendious definition of the principle upon which the master's non-liability rests," given by Blackburn, J., in *Howells v. Landore Steel Company*, L. R. 10 Q. B. 62, at 64.

the master for the acts of a person whom he leaves, as it were, as his vice-principal, in the management of the concern was exploded ; but it was contended—first, that the defendants, as a corporation, could only act by their manager, for whom, therefore, they were liable. On Blackburn, J., saying, “that cannot make any difference; in *Morgan v. Vale of Neath Railway Company* the defendants were a corporation, and nobody thought of suggesting any distinction on that ground,” the contention was abandoned, and a second point urged—that under s. 26 of the Coal Mines Regulations Act, 1872,¹ by which the owner of a coal mine was obliged to appoint a certified manager, the manager so appointed was in a different position from an ordinary manager. The Court, however, would not even grant a rule on the point, Cockburn, C.J., saying: “I cannot say that Thomas here was anything more than a vice-principal, or manager, and he was, therefore, a fellow-servant.”

Leddy v.
Gibson.

Almost at the same time as this case an attempt was made in the Scotch Courts to except the captain of a ship from the principle laid down in *Wilson v. Merry*.² A sailor sued the owners for injuries caused by the captain's negligence during the voyage.³ The Lord Ordinary dismissed the summons, on the authority of Lord Cranworth's *dictum* in *Wilson v. Merry*, that “workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority. A gang of labourers employed in making an excavation, and their captain, whose directions the labourers are bound to follow, are all fellow-labourers under a common master, as has been more than once decided in England, and on this subject there is no difference between the laws of England and Scotland.” On appeal it was argued that there was no analogy between such a case as *Wilson v. Merry* and the present ; that the captain was, in all matters connected with the management of the ship, absolute master of the sailors, so that even the owners themselves could not interfere. The Lord Ordinary's decision was, however, unanimously affirmed ; and the Court pointed out that if an injury be done to third persons the owners would be liable, because the captain is the servant of the owner ; and that if he is the servant of the owner, then the owners are not liable, because the captain and crew are fellow-servants according to any recognized test, as they are “all equally and wholly interested in”⁴ the navigation of their vessel, and in a safe prosecution of its voyage.

Ramsay v.
Quinn.

Shortly afterwards a very similar case came before the Irish Court of Common Pleas on demurrer.⁵ The negligence alleged

¹ 35 & 36 Vict. c. 76, repealed 50 & 51 Vict. c. 58, s. 84.

² L. R. 1 Sc. App. 326.

³ *Leddy v. Gibson* (1873), 11 Macph. 304.

⁴ Per Lord Cowan, 11 Macph. at 308.

⁵ *Ramsay v. Quinn*, Ir. R. 8 C. L. 322.

was that the captain of a ship "so unskilfully and improperly ordered the said John Ramsay" "to abandon the said ship," that the said John Ramsay was drowned. The demurrer raised the point that the captain was a fellow-servant. The Court (Monahan, C.J., and Morris, J.) overruled the demurrer, Morris, J., on the ground that there was no necessary conflict between *Wilson v. Merry*, and *Murphy v. Smith*; which latter case recognized the principle "that where an employer has an agent or representative, held to be so by the jury, and who is not merely a fellow-workman of the party sustaining the injury, the employer is liable for an injury to his servant occasioned by the negligence or unskilfulness of his agent or representative." "Under which category, then," says Morris, J., "is the captain or master of the vessel in this case to be placed? Are we to regard him merely as a fellow-servant of the deceased, or as the agent and representative of the defendants? In my opinion he comes within the latter description, and, if so, *cadit questio*. He is the agent and representative of the owners during the voyage." "He has authority to bind the owners for repairs and necessaries. He can even settle claims for demurrage." Monahan, C.J., concurred, but preferred to rest his decision on the facts alleged in the complaint, "that the deceased was bound to obey the orders of the captain, independently of any authority which the latter would, from his position as captain or master of the vessel, possess."

Judgment of
Morris, J.Judgment of
Monahan, C.J.

The decision in *Ramsay v. Quinn*¹ was much pressed on the Court of Appeal in *Hedley v. Pinkney and Sons Steamship Company*² where the negligence of the captain, in leaving an opening in the ship's bulwarks unprotected by a rail during a storm, was the cause of the loss of life of the plaintiff's husband. The Court held the negligence to be the negligence of a fellow-servant. "I must decline," said Lord Esher, M.R., "to accept the decision in the case of *Ramsay v. Quinn* as authority with regard to the English law on the subject, and if the Court in that case

Hedley v.
Pinkney &
Sons Steamship
Company.

¹ Ir. R. 8 C. L. 322.

² (1892) 1 Q. B. 58, affd. in H. of L. (1894), App. Cas. 222. A second point taken in the case was, that the leaving the opening in the bulwarks was "unseaworthiness," within sec. 5 of the Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80). The Court of Appeal, however, relied on Parke, B.'s, definition in *Dixon v. Sadler*, 5 M. & W. 405, affirmed 8 M. & W. 895; and on a *dictum* of Lord Blackburn, in *Steel v. State Line Steamship Company*, 3 App. Cas. 72, at 90, which were also accepted as conclusive in the House of Lords. *Gordon v. Pyper*, 20 Rettie (H. L.) 23, was an action for damages against the owner of a steam trawler by one of the seamen, who averred that while engaged with other seamen in raising the trawl he received an injury in consequence of the defective splicing of two ropes. The House of Lords held that as the purser did not aver that the splicing was defective at the time the vessel was equipped, the action was not relevant. Lord Watson said, at 17, "I should not have been prepared to hold that a mere defect in the splicing of the tackle, which is obvious, constitutes any default of duty on the part of the shipowner if he provides the master and crew with the proper materials for correcting the defect in the course of the voyage."

meant to hold that what they were deciding was the English law on the subject, I must say that I cannot agree with them. To my mind, it is clear that the plaintiff cannot rely on the negligence of the captain, because he was the fellow-servant of the deceased man." The Lords Justices concurred. In the House of Lords it was again urged that the master of a vessel, although in some respects the servant of the shipowner, possesses in relation to the crew powers and duties independent of him, so that the exemption of the master from liability to his servant does not apply to such a case. Lord Herschell, C., thus disposes of the point:¹ "The only authority cited for this proposition was a case of *Ramsay v. Quinn*, in the Court of Common Pleas (Ireland).² But in view of the judgment of this House in *Wilson v. Merry*,³ which was recently considered in the case of *Johnson v. Lindsay*,⁴ I do not think it is possible to give effect to the contention of the appellant." The judgment of the Court of Appeal was consequently affirmed.

Position of the
captain of a
ship.

The captain is the servant of the owner if the owner appoints him and exercises authority over him, or has a right as between themselves to exercise the authority which an owner usually exercises over his captain. He ceases to be his servant where there is a charter parting with the whole possession and control of the ship under which the charterer has authority to do what he pleases with regard to the captain, the crew, and the general management of the ship, even though the owner is still on the register as "managing owner."⁵

Position of a
seaman on
board ship.

It may here be remarked that the case of a seaman on board ship is very different from that of the ordinary workman on land, in as much as the maxim *Volenti non fit injuria* can apply to him, if at all, in only a very qualified manner. For example, if a seaman is told to perform some duty while at sea because something is manifestly wrong with the gear of the ship, and refuses to obey orders, the loss of the lives of all on board may be the result of his conduct. Since then it is impossible for him to strike work, so also it would be against the very rudiments of justice to allow his employers to escape liability in the event of his sustaining injury, by the plea that he, knowing and appreciating the risk, entered on the employment; and this has been in terms laid down in Scotland.⁶

Smith v. Steele. With these cases should be noticed *Smith v. Steele*.⁷ There the

¹ (1894) App. Cas. at 226.

² Ir. R. 8 C. L. 322.

³ L. R. 1 Sc. App. 326.

⁴ (1891) App. Cas. 371.

⁵ *Baumwoll Manufactur von Scheibler v. Gilchrest* (1892), 1 Q. B. 253, in H. L. (1893) App. Cas. 8, *sub nom.* *Baumwoll Manufacturer von Carl Scheibler v. Furness*.

⁶ *Rothwell v. Hutchison*, 13 Rettie 463.

⁷ (1875) L. R. 10 Q. B. 125. In the Ex. Ch. in *The General Steam Navigation Company v. British and Colonial Steam Navigation Company, Limited*, L. R. 4 Ex. 238, it was held that the relation of master of servant did not exist between the owner

question arose whether a compulsory pilot under the Merchant Shipping Acts is a fellow-servant within the rule excluding such from recovering from their masters, on the ground of a common employment. The answer is:¹ By 35 and 36 Vict. c. 73, s. 9 power is given "to allow any pilot or class of pilots any rate less than the rate for the time being demandable by law; but no power is given to enable a pilot to demand more. He cannot, therefore, make any special bargain to receive larger pay in consideration of his taking the risk upon him. An ordinary servant has, as Lord Cairns points out² (at least theoretically) the power of choosing whether he will enter into the employment of a master who does not agree to act personally in the management of his business, or, as an alternative, to be responsible for the negligence of those he employs. The pilot has no such choice: he must conduct the ship on the terms fixed by the statutes which regulate pilotage; and we can find nothing in those statutes to justify the conclusion that the pilot is to take upon himself the risk." The result is that an action lies by the pilot against the shipowners for injuries caused to him while acting on the defendants' vessel, by the negligence of their servants.

In the Irish Courts, in *Conway v. Belfast and Northern Counties Railway Company*,³ a very strenuous attempt was made again to set up the doctrine of a special liability for the acts of an *alter ego*, on the authority of *dicta* in *Murphy v. Smith*,⁴ and *Feltham v. England*.⁵ The action was brought under Lord Campbell's Act for damages for the death of Conway, a workman on the defendants' line, alleged to have been caused through the negligence of the traffic manager. The defendants contended that the traffic manager was not a fellow-servant with a milesman, but was a vice-principal or representative. The Common Pleas, in giving judgment, cited the cases of *Wilson v. Merry*, and *Howells v. Landore Siemens Steel*

Irish cases endeavour to reassert liability for the acts of an *alter ego*.

of a vessel and the compulsory pilot. Cp. *The Stettin, B. & L. (Adm.)* 199, where the vessel was within her port and exempt from compulsory pilotage. *Bowcher v. Noidstrom*, 1 Taunt. 568.

¹ L. R. 10 Q. B. at 129.

² Referring to *Wilson v. Merry*, L. R. 1 Sc. App. 326.

³ (1875) Ir. R. 9 C. L. 498, Ir. R. 11 C. L. 345. As to the American Law, see *Shearman and Redfield, Negligence* (4th ed.) § 241.

⁴ 19 C. B. N. S. 361, Erle, C.J., is reported at 366 as saying: "The question is, whether Debor is to be considered as the vice-principal of the factory. I avoid the word manager, which is an ambiguous one, and may mean either a person retained generally to represent the principal in his absence, or one who has the superintendence of a particular contract or job, in which latter case he would be in no different position from that of a fellow-workman."

⁵ L. R. 2 Q. B. 33, at 36, where Mellor, J., says: "We think that the foreman or manager was not, in the sense contended for, the representative of the master. The master still retained the control of the establishment, and there was nothing to show that the manager or foreman was other than a fellow-servant of the plaintiff, though he was a servant having greater authority. As was said by Willes, J., in *Gallagher v. Piper*, 33 L. J. (C. P.) at 335, "A foreman is a servant as much as the other servants whose work he superintends."

Judgment of
Palles, C.B.,
in Irish
Exchequer
Chamber.

Company, and decided that they were, "therefore, obliged to hold that the defendants are not liable for the neglect of their manager Cotton."¹ The case was then taken to the Irish Exchequer Chamber. A long written judgment was delivered by Palles, C.B., in which he cites the list of cases from *Clarke v. Holmes*, to *Murphy v. Smith*, and *Wilson v. Merry*, and draws two conclusions:²

"First—that there is no distinction as to the exemption of a common employer from liability to answer for an injury to one of his workmen from the negligence of another in the same employment, in consequence of their being workmen of different classes: But,

"Secondly—that a master may so depute to another the entire control of his establishment as to constitute such other person, as between himself and the workmen in the establishment, not a fellow-servant having greater authority, but the *alter ego* or representative of the master; and that for the acts of such a person the master would be responsible to a fellow-servant." The judgment then proceeds as follows: "I cannot find in any of the cases an attempt to define, with any degree of strictness, when the character of 'servant having greater authority than others' ceases, and that of representative, vice-principal, or *alter ego* of the master is acquired. Possibly it may hereafter be held that it is essential to the latter character that he should have been invested by the master with such authority that, as between him and the master, nothing done by him in relation to the business of which he has control would be an act unauthorized by the master. It is, however, unnecessary for us to draw this line. The application to the case before us, of conceded principles is, in our view, sufficient for our decision." The Irish Exchequer Chamber therefore draw the *prima facie* inference that those employed by the company are fellow-servants, and permit the plaintiff to rebut the inference by showing the status of the negligent person to be that of vice-principal or representative.

The peculiarity of this case, as reported, is that, while the Irish Court of Common Pleas decide a question of principle on the authority of a very recent English case, the Irish Exchequer Chamber, while affirming the Common Pleas on a question of fact, at the same time express an opinion distinctly averse to that of the Common Pleas on the point of principle, without even noticing the case upon the authority of which the judgment in the Common Pleas had been based. If the case of *Howells v. Landore Siemens Steel Company* had been brought to the attention of the Exchequer Chamber it is difficult to understand how the Court could have

¹ I. R. 9 C. L., at 504.

² Ir. R. 11 C. L., at 353.

avoided noticing it ; and as the case was distinctly referred to in the judgment of the Court below, it is equally difficult to see how it could fail to be brought to their notice.¹

There is a distinct divergence of opinion between the Irish Exchequer Chamber and the English Court of Queen's Bench on the point. This difference must be referred to the authority of the House of Lords in *Wilson v. Merry*.² There the Lord Chancellor says : " What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all he is bound to do, and if the persons so selected are guilty of negligence, this is not the negligence of the master." This opinion does not seem to have been excepted to by any of the other Law Lords ; and if Blackburn, J., is right in the concluding sentence of his judgment in *Howells v. Landore Siemens Steel Company*, the decision of the House of Lords is distinct, at least so far as this, that the fact that the servant held the position of vice-principal does not affect the non-liability of the master for his negligence as regards a fellow-servant. The case of *Conway v. Belfast and Northern Counties Railway Company*, then, so far as it draws a distinction between a " vice-principal " and a manager and foreman, runs counter to the other cases.

The Scotch Courts, on the other hand, at once took in the full effect of Lord Cairns's judgment. This is clear from *Sneddon v. Moss End Iron Company*,³ unimportant otherwise than for the recognition of this principle. Lord Ardmillan thus expresses the view of the Court :⁴ " In that case " (*Wilson v. Merry*) " I then attempted, as I had done on previous occasions, to make a distinction and exception in regard to the position of a superior

Sneddon v. Moss End Iron Company.

Lord Ardmillan's interpretation of the decision in *Wilson v. Merry*.

The reporter in *Ir. R. 9 C. L. 498*, at 501*n*, alleges a " materially different report " of *Howells v. Landore Siemens Steel Company*, to have been given in *44 L. J. Q. B. 25*, from that in *L. R. 10 Q. B. 62*, but, whatever the terms of the report it is incontestable that in that case the certificated manager by *statute* was to have " the control " of the mine. Notwithstanding this the Court held that he did not hold a position different from that of a fellow-workman.

² *L. R. 1 Sc. App. 326*, at 332.

³ (1876) 3 *Rettie* 868. In *Wright v. Dunlop*, 20 *Rettie* 363, however, there are expressions inconsistent with what has been regarded as the settled law : see per Lord Trayner, at 369. The concluding paragraph of the head-note is in distinct conflict with the rule laid down in *Howells v. Landore Steel Company*, *L. R. 10 Q. B. 62* (see *ante*, 807), and can only be explained by Blackburn, J.'s, remark at 65 : " In Scotland it seems that a vice-principal had been held to be in a different position from an ordinary fellow-servant." See, however, per Lord Cranworth, *Bartonsill Coal Company v. Reid*, 3 *Macq. H. L. Sc. 266*, at 285, cited, *post*, 824. In America a conductor having the charge of a train is, in fact, and should be treated as, the personal representative of the corporation for whose negligence it is responsible to subordinate servants." *Chicago, Milwaukee, and St. Paul Railway Company v. Ross*, 112 *U. S. (5 Davis) 377*.

⁴ 3 *Rettie* at 874.

manager with general superintendence, whom I was disposed to regard as the representative of the master rather than as a fellow-workman of the man injured. This distinction was not accepted. The House of Lords, in affirming the judgment, placed the case on the broader ground that in a question of damages for injury inflicted by the fault of one servant on another down through the whole gradation of servants, the employer is not responsible, unless personal fault on his part is instructed. The opinion of Lord Chancellor Cairns leaves no doubt on this matter: "To a certain extent it is true, as has been remarked, that these observations were not absolutely necessary to the decision of the case immediately before the House. But they were the natural supplement and corollary of the views which he had previously expressed; and it is vain to contend against the conviction that the law is now as Lord Cairns has declared it."

Conclusion.

The conclusion is, therefore, inevitable that persons in all grades of employment that can be comprehended as "common," are included within the disability to recover against the employer for injuries sustained from the negligence of persons of any grades whatever in the same employment.

Formula of
Brett, L.J.

In *Charles v. Taylor*,¹ Brett, L.J., reduced this principle to the following formula: "When the two servants are servants of the same master, and where the service of each will bring them so far to work in the same place and at the same time that the negligence of one in what he is doing as part of the work which he is bound to do may injure the other whilst doing the work which he is bound to do, the master is not liable to the one servant for the negligence of the other."

Warburton v.
Great Western
Railway
Company.

This was expressed almost in the very terms of the judgment of Kelly, C.B., in an earlier case,² argued by the Lord Justice when at the bar, and which marks a class of cases wanting the element of a common master, though the employment is a common employment. The plaintiff was in the employment of the London and North-Western Railway Company, and was at work at the Victoria Station in Manchester, which was used in common by the plaintiff's employers and the defendants under an agreement; when an engine-driver in the employment of the Great Western Railway Company shunted a train belonging to the defendants, and in so doing was guilty of the negligence complained of. On motion for a new trial, Brett, Q.C., argued that the test of fellow-service was not the

¹ 3 C. P. Div. 492, at 496; cp. *Sweeney v. Duncan*, 19 Rettie 870.

² *Warburton v. Great Western Railway Company*, L. R. 2 Ex. 30; also *Vose v. Lancashire and Yorkshire Railway Company*, 2 H. & N. 728, where a blacksmith, working for the East Lancashire Railway Company, was killed through the negligence of the servants of the Lancashire and Yorkshire Railway Company, working under joint rules; also *Graham v. North-Eastern Railway Company*, 18 C. B. N. S. 229; *Avilla v. Nash*, 117 Mass. 318.

doing work for a common object or being engaged in a common work; neither was it being paid by the same person, as was shewn by the case of *Degg v. Midland Railway Company*,¹ for there the volunteer who was paid nothing was considered as on the same footing as the defendants' paid servants; but it was the working subject to a common direction and control. Both the plaintiff and the defendants' servants were bound to work according to the regulations of the London and North-Western Railway Company and under the control of their station-master. Kelly, C.B., states the rule of law applicable as follows: "Where two or more persons are the servants of one master, and engaged in one common employment, the master is not liable to an action for any injury sustained by one servant by reason of the negligence of another, in the work or employment which is common to both, or incidental to the carrying on of the general business or the operations in which the one and the other are engaged." Having thus enunciated the proposition, the Chief Baron comments on it thus: "The ground upon which these decisions have been pronounced is, that it must be presumed that a servant takes upon himself the risk of any injury he may sustain by the negligence of another servant, under the same master and in the same employment, and that such risk is part of the consideration for the wages which he is entitled to receive. This proposition, to the extent to which I have stated it, and which is to be deduced from the case of *Morgan v. Vale of Neath Railway Company*,² and many other authorities, has now become established law. But we are of opinion that, inasmuch as the injury sustained by the plaintiff was occasioned by the servant of the defendants, *not in the course of any common employment or operations under the same master*, but by negligence in the discharge of his ordinary duty to the defendants alone, this case is distinguishable from all which have been decided in relation to the above doctrine of exemption, and that therefore the action is maintainable."³

Formula of
Kelly, C.B.His comment
on it.

*Swainson v. North-Eastern Railway Company*⁴ is a very similar case, which was taken up to the Court of Appeal a few months previously to the decision in *Charles v. Taylor*.⁵ Bramwell, L.J., there gives the test⁶ as being, whether "a relation has been established between the person who complains and the master of the person who does the injury"; Brett, L.J., anticipating the formula which he soon afterwards framed in *Charles v. Taylor*,⁷ said: "I

Swainson v.
North-Eastern
Railway
*Company.*Test sug-
gested by
Bramwell,
L.J.¹ 1 H. & N. 773.² L. R. 1 Q. B. 149.³ Brett, Q.C., offered to pay the whole damage at once if leave to appeal were given. It was however, refused.⁴ 3 Ex. Div. 341; *Page v. Metropolitan Railway Company*, 4 Times L. R. 103.⁵ 3 Ex. Div. at 348.⁶ L. c. at 349.⁷ 3 C. P. Div. 492.

think that the authorities bear out the proposition," "that in order to give rise to the exemption there must be a common employment and a common master; it is not necessary that there should be a common service for a definite time or at fixed wages; for the exemption exists in the case of volunteers and of other persons, where plainly there has been no contract for payment; a volunteer puts himself under the control of another person, and in respect of that other person he is for the time being in the position of a servant. . . . The question is, Did the deceased adopt such terms of service as placed him under the orders of the defendants? If he did, I think that would be sufficient to exempt them from liability."

These later cases of *Swainson v. North-Eastern Railway Company*¹ and *Charles v. Taylor*² are, however, only important as shewing the working out in practice of the principle formulated by Lord Cairns, and not as marking any further development of legal principle.

COMBINED WORKING.

Work done
under a sub-
contract.

There is a class of cases where matters of greater difficulty arise. We have seen that though various employments may be so implicated in their various stages that they become in effect one combined operation, each employment is yet in law held to remain distinct for the purpose of ascertaining liability in the event of accident arising from negligence, if only the different portions of the work are carried on by independent contractors. There remains to be considered, whether the fact of the one employer being dependent on the other—the work being done under a sub-contract—makes any difference in the liability. *Wiggett v. Fox*³ is the first case raising this point. The deceased had been a workman employed under a sub-contractor. The death arose from the carelessness or negligence of another workman engaged in doing work for the defendants, who were the general contractors for the whole, and under whom the sub-contractor, whose servant the deceased was, had been engaged to perform a definite part of the whole contract. The jury found that the deceased was employed by the sub-contractor, and was not directly employed by the defendants.

Wiggett v.
Fox.

On this finding the Court nonsuited, holding the true principle to be, that a master is not in general responsible to one servant for an injury occasioned by the negligence of a fellow-servant whilst acting in one common service. "We think," it was added,⁴ "that

¹ 3 Ex. Div. 341; *Page v. Metropolitan Railway Company*, 4 Times L. R. 103.

² 3 Ex. Div. 348.

³ (1856) 11 Ex. 832.

⁴ 11 Ex. at 838.

the sub-contractor and all his servants must be considered as being, for this purpose, the servants of the defendants whilst engaged in doing work, each devoting his attention to the work necessary for the completion of the whole, and working together for that purpose."

Wiggett v. Fox was followed by Abraham v. Reynolds.¹ The plaintiff, a servant of persons employed by the defendants to carry cotton from a warehouse, was receiving the cotton into his lorry, when, in consequence of the negligence of the defendants' porters, a bale fell upon him. It was held that the plaintiff and the defendants' servants, not being under the same control or forming part of the same establishment, were not so employed upon a common object as to deprive the plaintiff of a right of action against the defendants for such negligence. Abraham v. Reynolds.

These cases have sometimes been treated as not reconcilable. In fact they proceed upon distinctive principles. Even without Channell, B.'s,² gloss on Wiggett v. Fox, in Abraham v. Reynolds, these different principles are distinguished by considering that in Wiggett v. Fox the injured and the injuring persons were members of the same establishment—that is, were working under the same direction and under the same rules, and were also working jointly for a common object; while in Abraham v. Reynolds they were not members of the same establishment, and there was mere *contact* in work, not co-operation in a common scheme. As Watson, B., points out: ³ "It is not a joint operation. Suppose a woman went to a grocer's shop to buy vinegar, and the grocer's boy, in giving what he supposed to be vinegar, poured oil of vitriol over her hands, could she be said to be the servant of the master of the shop because in one sense assisting in the operation?" Abraham v. Reynolds can in no sense be said to be the case where two persons serve the same master, since there exists no subordination between them. The contract to carry the bales is independent work, complete in itself, and distinct; while the sub-contract to build the Crystal Palace was a step in the co-operation towards the completion of a general scheme of work in which each portion was in subordination to the carrying out of the general design, and the whole under a paramount direction. The gloss of Channell, B.,⁴ accentuates the principle, which even without these additional Compared.
Watson, B., discriminates the cases.
Gloss of Channell, B.

¹ 5 H. & N. 143; Wyllie v. Caledonian Railway Company, 9 Macph. 463, is a Scotch case, very similar in principle, and decided upon similar principles. Cp. Calder v. Caledonian Railway Company, 9 Macph. 833, and Gorman v. Morrison, 12 Rettie 1073. Wiggett v. Fox was followed in Johnson v. City of Boston, 118 Mass. 114.

² Channell, B., was counsel for Fox in Wiggett v. Fox. See, too, the case as reported, 25 L. J. Ex. 188; and remarks of Cockburn, C.J., in Rourke v. White Moss Collier Company, 2 C. P. Div. 205, at 207, 208.

³ 5 H. & N. at 146.

⁴ 5 H. & N. at 150.

circumstances is an intelligible one. His words are: "It was proved that the deceased was paid by the defendants, and it further appeared by the printed rules which were given in evidence, and by the evidence of Moss, one of the sub-contractors, that the defendants had a control over, and a power to dismiss, Wiggett, though engaged by the contractor."¹ When the relation between the employed is that of superiority and inferiority in carrying out a common scheme of work—that is, when the general control of work and the arrangements for its progress are in the hands of one contractor, while the carrying out of some portion of the details of the work is in the hands of another—then the servant of the inferior is not to recover against the superior; but where there is no relation of superiority or inferiority in the carrying out a common scheme of work, but the relation is a mere relationship of co-operation, then the employments are distinct, and the servant of the one can recover against the servant of the other.

Murray v.
Currie.

Murray v. Currie² is consistent with this distinction. There, a servant of a stevedore, while engaged in unloading a ship, was injured by the negligence of one of the ship's crew, who had been temporarily engaged for the same purpose. The injured man sued the shipowner in whose general employment the injuring man was. The judgment of Willes, J., turned on the fact that the stevedore and his men were acting altogether independent of the shipowner's control. The same ground is taken by Bovill, C.J.: The stevedore "had entire control over the work, and employed such persons as he thought proper to act under him." "The defendant did not stand in the relation of a superior." And Turner v. Great Eastern Railway Company³—a case, according to Lord Coleridge, C.J., "exceedingly near the line"—recognizes a similar principle. There the defendants employed a contractor to unload coal trucks. The contractor engaged his own men, and had entire control over them. The plaintiff, while working for the contractor, was injured by the negligent shunting of one of the defendants' engines bringing coal trucks to the sidings. This was held to be within the principle of Abraham v. Reynolds, and not within the principle of Wiggett v. Fox, for "the defendants did not pay the plaintiff, and had no control over him so as to be able to engage or dismiss him." Grove, J., says: "No doubt the cases do run into fine distinctions, but there is sufficient breadth of distinction here, in my opinion, to entitle the plaintiff to our judgment."

Turner v.
Great Eastern
Railway
Company.

¹ See the case as reported, 25 L. J. Ex. 188.

² (1870) L. R. 6 C. P. 24, which is distinguished in Oldfield v. Furness, Withy and Company, 9 Times L. R. 515. Manning v. Adams, 32 W. R. 430. See also Cunningham v. Grand Trunk Railway Company, 31 Upp. Can. Q. B. 350; Sweeney v. Murphy, 32 La. Ann. 628.

³ (1875) 33 L. T. (N.S.) 431.

This distinction, though not thus expressed by the Court, may perhaps be described as that between a "sub-contractor" and an "independent contractor," where the relation is one of contact in independent work, and not of co-operation in common work. The Court, on the facts of the case, held, that the work of the contractor was independent, and not a portion of a scheme, Lord Coleridge, C.J., using the caution: "The case is a difficult one, as I have said, because it is so near the line; and the line to be drawn is one which is not easy to state in language, and I will not attempt to give a definition calculated to meet all cases. Each case must depend upon its particular circumstances, and no single circumstance can be stated as being a certain and single test of general application; but several circumstances may, at any rate, be remarked upon, all or some of which, when they occur, may shew what is on one side or the other of the line which is not itself easy to be drawn."

Rourke *v.* White Moss Colliery Company¹ was decided on the following facts: The defendants were the proprietors of a coal mine, who commenced sinking a shaft themselves, and ultimately entered into a contract with one Whittle to continue the work, when the plaintiff became the servant of Whittle, and was paid by him. The injury sued on arose from the negligence of one Lawrence, an engineer, appointed by the defendants to work a steam-engine, which, under the contract with Whittle, was provided by the defendants to facilitate the work. Lawrence, though employed and paid by the defendants, was, with the engine, placed under the sole orders and control of Whittle. Lord Coleridge, C.J., thus states the point: "If, under these circumstances, the plaintiff and Lawrence were both in the employ of Whittle, the plaintiff is, upon the principle laid down in *Priestley v. Fowler*,² and several subsequent cases, debarred of remedy against the defendants. If Lawrence was not in Whittle's employ, then the defendants are liable." His conclusion is that the case fell within *Priestley v. Fowler*. In the Court of Appeal, Mellish, L.J., guards against an adoption of Lord Coleridge, C.J.'s, opinion, that, "if Lawrence was not in Whittle's employ, then the defendants were liable." He states the point thus: "There are two questions—first, whether Lawrence, in doing the act complained of, was acting as the servant of the defendants or of Whittle. If he was not acting as the defendants' servant they would not be liable; but if he was acting as the servant of the defendants they *might* be liable. But then the second question would arise, whether or not the plaintiff was his fellow-servant." In the result, the Court of Appeal affirmed

Rourke *v.*
White Moss
Colliery
Company.

¹ (1876) 1 C. P. D. 556, 2 C. P. Div. 205.

² 3 M. & W. 1.

the Common Pleas Division, on the narrow ground "that Lawrence was practically in Whittle's service at the time he was guilty of the negligence complained of."¹

Donovan v.
Laing,
Wharton and
Down Con-
struction
Syndicate.

Rourke v. White Moss Colliery Company was approved and followed by the Court of Appeal in Donovan v. Laing, Wharton and Down Construction Syndicate,² where the facts were very similar. Defendants selected the man whose negligence was the cause of the injury, and paid him, but lent him to another firm to work a crane, in negligently doing which the accident happened; and since this other firm had the control of him while working the crane and might discharge him, during his occupation he ceased to be the defendants' servant. "We have only to consider," said Bowen, L.J.,³ "in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act," or as the same learned judge said in Moore v. Palmer:⁴ "The tests were, who had the power of selecting, of controlling, and of dismissing? . . . The great test was this, whether the servant was transferred, or only the use and benefit of his work."

Claridge v.
Union Steam-
ship Company.

Rourke v. White Moss Colliery Company⁵ was distinguished in Claridge v. Union Steamship Company,⁶ a New Zealand case. Plaintiff was injured while employed as a labourer by stevedores in discharging a cargo of coal from one of the respondent company's steamers, by the negligence of a winch driver provided by the defendants, and who was one of the crew of the steamer. The cargo was being discharged under a contract between the stevedores and the defendants by which defendants provided the winch driver. The Court considered the case to differ from Rourke's in that there the contract expressly provided

¹ Per Cockburn, C.J., 2 C. P. Div. 205, at 209. This case is noteworthy from the fact that, in the Divisional Court, the judges, Lord Coleridge, C.J., Archibald and Lindley, JJ., express doubt about the decision of Abraham v. Reynolds; while in the Court of Appeal, Cockburn, C.J., doubt as to Wiggett v. Fox. "It is quite unnecessary to say whether the case of Wiggett v. Fox, 11 Ex. 832, which was relied on for the defendants, was rightly decided. My own view is that it was not; though I might agree with the decision if I could come to the conclusion that the facts were what Channel, B., appears to have thought they were, in the explanation he gives of that case in Abraham v. Reynolds," at 208. The other judges, however, as may be seen from the extract in the text from the judgment of Mellish, L.J., studiously refrain from comment on either of the cases. Wiggett v. Fox was much canvassed in the various stages of Johnson v. Lindsay, particularly in the Court of Appeal, 23 Q. B. Div. 508, at 512 and 515. In the House of Lords Lord Herschell said of it (1891), App. Cas. 371, at 379: "If the law there laid down would determine the present case in favour of the respondents, I should feel bound to reject it as inconsistent with all the other English authorities." See also per Lord Watson, at 383. Roberts v. Tottenham Lager Beer Brewery Company, 6 Times L. R. 4.

² (1893) 1 Q. B. 629.

³ L. c. at 633.

⁴ 2 Times L. R. 781 (C. A.)

⁵ 2 C. P. Div. 205.

⁶ 11 N. Z. L. R. 294, affirmed by the Privy Council, (1894) App. Cas. 185.

that the engineers and engine should be under the control of the contractor ; while in the case before the Court “ from the terms of the contract between the defendant company and the Stevedores Association it is a natural inference that the seamen employed were to remain under the orders of their own officers. “ The maintenance of discipline amongst a crew and the general economy of a ship required that the direct control of the seamen should not be parted with by the defendant company. The decision in Rourke’s case is founded on the conclusion at which the Court arrived—that the engineer had been put under the control of the contractor. The present case, in our opinion, belongs to the class referred to by Cockburn, C.J., in which the defendants have undertaken to do part of the work themselves by means of their machinery and servants.” The decision of the New Zealand Court was affirmed by the Privy Council.¹ In the course of the judgment Lord Watson observed : “ That the servant of A may, on a particular occasion, and for a particular purpose, become the servant of B, notwithstanding that he continues in A’s service, and is paid by him, is a rule recognized by a series of decisions.” The case before the Court, however, did not call for any discussion of legal principles, and was determined exclusively on its facts.

The question of the liability of a superior employer for an injury caused by the negligence of a servant in his direct employment to the workman of a sub-contractor engaged in carrying out a common scheme of work, was exhaustively discussed in the Scotch case of *Woodhead v. Gartness Mineral Company*.² The material facts were :—Two miners contracted with the defenders to drive a level in a mine. They engaged other miners to do the work, amongst whom was Woodhead. At the time of the accident there were two sets of workmen engaged in the mine—one in sinking, the other, under the contract, in driving the level. A servant of the defenders unconnected with either of the working sets of servants, was underground manager. He had entire control of the ventilation, and was charged with the duty of keeping the pit safe, under special rules made by virtue of the Coal Mines Regulation Act,³ s. 52. The defenders did not approve the employment of Woodhead further than by allowing him to work ; they had nothing to do with his wages, either as to amount or as to conditions of payment ; and he might have been dismissed by the contractors without the consent or even against the will of the defenders. The underground manager might also have dismissed Woodhead under special rules made for the conduct and guidance of the persons

¹ *Union Steamship Company v. Claridge* (1894), App. Cas. 185.

² 4 Rettie 469.

³ 35 & 36 Vict. c. 76, now superseded by 50 & 51 Vict. c. 58.

acting in the management of this mine, or employed in or about the same, "to prevent dangerous accidents, and to provide for the safety and proper discipline of the persons employed in or about the mine," which Woodhead had signed.¹ The death of Woodhead was caused by the negligence of the underground manager in having incautiously removed a plank while making an alteration in the arrangement for the ventilation of that part of the mine which was at the time occupied by the sinkers.

The jury having found a verdict for the pursuer, the Inner House judges of the Court of Session, by a majority of six to one, the Lord Justice-Clerk (Moncreiff) being the sole dissentient, entered judgment for the defendants on the ground that "the mine-owner is free from responsibility, not because the injured and the injurer are both his own hired and paid servants, but because he is not personally in fault, and has not warranted the injured workman against the perils of the work."²

Followed in
Wingate v.
Monkland Iron
Company and
Maguire v.
Russell.

Three more of the Scotch judges³ concurred in the decision in Woodhead's case, in *Wingate v. Monkland Iron Company*⁴ which was decided on almost identical facts, and in *Maguire v. Russell*⁵ a further extension of the rule was made. One tradesman had contracted to execute plumber's work and another to lay asphalt paving in the same building. They worked under independent contracts, and while they were so engaged a workman employed in asphaltting was injured by a hammer which fell through a skylight through the negligence of one of the plumber's servants. The injured man having brought an action against the plumber, the Second Division of the Court of Session held that the action to fail as indistinguishable from *Woodhead v. Gartness Mineral Company*.⁶

Johnson v.
Lindsay.

The consideration of this class of cases came before the House of Lords in *Johnson v. Lindsay*,⁷ and there received a final settlement. Builders contracted to erect a block of houses under a specification prepared by the owner's architect. Certain fire-proof portions of the house were to be executed by the respondents. The respondents dealt directly with the architect, and they were not in any way under the direction or control of the builders. During the progress of the work a workman of the

¹ By the same rule it was provided that miners and other workmen should be subject to the control and orders of the agent, where one had been appointed, and of the manager and overman.

² Per Lord President Inglis, 4 Rettie 469, at 478.

³ Lords Young, Craighill, and Rutherford Clark.

⁴ 12 Rettie 91.

⁵ 12 Rettie 1071. *Congleton v. Angus*, 14 Rettie 309, which was questioned in *Smyth v. Turnbull*, 17 Rettie 877.

⁶ Rettie 469.

⁷ (1891) App. Cas. 371. *Cameron v. Nystrom* (1893) App. Cas. 308.

builders was injured by the negligence of one of the respondents' workmen. A verdict for the plaintiff was set aside and judgment ordered to be entered for the defendants by the Queen's Bench Division,¹ on the ground that the plaintiff at the time of the accident was engaged in a common employment with the servants of the defendants, whose negligence caused his injury. This judgment was affirmed by the Court of Appeal,² whose decision was reversed by the House of Lords.

It was considered that on the facts the plaintiff, the appellant, was in no sense a servant of the respondents; and since to sustain the immunity claimed it is essential that the person suing should himself be the servant of the master by whose servant's negligence the injury is caused, the plaintiff was held entitled to retain his verdict. "It must be remembered," said Lord Herschell,³ "that whilst a servant contracts with his master to bear the risks of the negligence of his fellow-servants, there is, as has been more than once laid down, a corresponding duty on the part of the employer to take due care to select competent servants. And it would be most unreasonable to hold that he is exempt from liability for his servants' negligence in any case where he is not under this obligation. But I do not see how such an obligation can arise otherwise than from some contractual relation. The obligation and the exemption appear to me to be correlative and to be implied from the relation of master and servant created between the parties."⁴ So far as *Wiggett v. Fox* was contrary to the view expressed in the House of Lords, it was rejected "as inconsistent with all the other English authorities";⁵ it was however said⁶ that, as explained by Channell, B., in *Abraham v. Reynolds*,⁷ "it does not support the argument of the respondents, and comes within the rule enunciated by Lord Cranworth."⁸

The result of the decision may be summed up as being that, in order to exclude the liability of one person for injury occasioned by his fault to the workman of another, it must be shewn that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that other person as his master for the purposes of the common employment.⁹ The enunciation of this principle

¹ Pollock, B., and Manisty, J.

² Cotton and Lopes, L.JJ., Fry L.J., dissenting.

³ (1891) App. Cas. at 378.

⁴ See the cases, *ante*, 783.

⁵ Per Lord Herschell, *L. c.* at 379.

⁶ Per Lord Watson (1891), App. Cas. at 383, 384.

⁷ 5 H. & N. 143, at 150.

⁸ In the Scotch case of *Bartonsbill Coal Company v. Reid*, 3 Macq. (H. L. Sc.) 266.

⁹ In *Ruth v. Surrey Commercial Dock Company*, 8 Times L. R. 116 (C. A.), Lord Esher, M.R., says: "It was a question for the jury whether the Dock Company did not reserve to themselves the power of interfering with the manner in which the work was

Lord Watson's view of the decision in *Woodhead v. Gartness Mineral Company*.

Lord Cranworth's view of the relations of general principles of jurisprudence to English and Scotch law respectively.

Woodhead v. Gartness Mineral Company decided on a misapprehension of a passage in Lord Cairns's opinion in *Wilson v. Merry*.

destroys the authority of *Woodhead v. Gartness Mineral Company*,¹ which, in the opinion of Lord Watson,² "goes the full length of affirming that, in cases of common employment under different masters, each master is freed from responsibility for injuries inflicted upon the workmen of other masters by the negligence of his servants." "I have therefore," he adds, "no hesitation in affirming that it is not the law of England." But if not the law of England, neither is it the law of Scotland. For, as was said by Lord Cranworth, in a case³ not a little quoted in *Johnson v. Lindsay*,⁴ and with reference to a very cognate matter, "if such be the law of England, on what ground can it be argued not to be the law of Scotland? The law, as established in England, is founded on principles of universal application, not of any peculiarities of English jurisprudence; and unless, therefore, there has been a settled course of decision to the contrary, I think it would be most inexpedient to sanction a different rule to the North of the Tweed from that which prevails to the South."

Now in the case of *Woodhead v. Gartness Mineral Company*,⁵ was decided on a misapprehension of a passage in Lord Cairns's opinion in *Wilson v. Merry*.⁶ "I do not think," that learned Lord, is reported to have said, "the liability, or non-liability, of the master to his workmen can depend upon the question whether the author of the accident is not or is, in any technical sense, the fellow-workman or *collaborateur* of the sufferer. In the majority of cases in which accidents have occurred, the negligence has, no doubt, been the negligence of a fellow-workman; but the case of the fellow-workman appears to me to be an example of the rule, and not the rule itself." Hence, it was argued that the test of immunity for the master is not service under a common employer, but service at a common work. Lord Watson, however, shews⁷ that this was not Lord Cairns's meaning, and by a review of the authorities at the time of the delivery of the opinions in *Wilson v. Merry*, he makes it clear that Lord Cairns's expression was directed to correct a current interpretation of the word "*collaborateur*" that restricted its application to fellow-servants labouring with their hands so as to adjust its use to the comprehension of all grades of service up to that of

done. If they had reserved that power, then although the work was done through contractors, and although the accident was caused by the negligence of a man employed by those contractors, yet the defendants were responsible, because the contractors were not independent contractors and their servant through whose negligence the accident happened was also the servant of the defendants."

¹ 4 Rettie 469.

² (1891) App. Cas. at 384.

³ *Bartonshill Coal Company v. Reid*, 3 Macq. (H. L. Sc.) 266, at 285.

⁴ (1891) App. Cas. 371.

⁵ L. R. 1 Sc. App. 326, at 331, 332.

⁶ 4 Rettie 469.

⁷ (1891) App. Cas. at 386.

the general manager, and not to stretch its application to include those who are not servants.¹

Subsequently to the decision of *Johnson v. Lindsay* in the Court of Appeal, and while the case was waiting for decision in the House of Lords, the Court of Appeal in New Zealand, in *Nystrom v. Cameron*,² refused to follow the English Court of Appeal, regarding it as a decision "not justified by the previously decided cases," and as introducing "a new rule of law foreign to the rule on which the earlier cases were decided, and which cannot be said to be a legitimate development of that rule."³

The decision of the majority of the New Zealand Court of Appeal, as stated by Williams, J.,⁴ not only anticipated, but forcibly expresses the conclusion of the House of Lords. "In all the previous cases the defendant was in some sense the master of the injured man, and it will be found that the exemption of the defendant from liability was strictly based upon the fact that this relation was shewn to have existed between them. I think it is clear from the language of the judgments that had no such relation been established, the ordinary rule that the defendant was liable for the negligent acts of his servants in the course of their business would have been applied by the Courts." The Privy Council affirmed this decision,⁵ and Lord Herschell, C., thus formulates⁶ the decision in *Johnson v. Lindsay*—that "where the person sued has committed negligence by one of his servants, the defence of common employment is only available to him where he can shew that the person suing was also his servant at the time of the occurrence of the injury."

In *M'Callum v. North British Railway Company*,⁷ the Court of Session followed *Johnson v. Lindsay*, definitely stating that since that decision the law of Scotland as expressed in *Woodhead's* case had been changed.

Some of the considerations applicable to determining the liability of the master for occurrences in the course of carrying out work, are indicated by an American case of the highest authority.⁸ The case was decided under a law similar to the English Employers' Liability Act. A workman was injured by the fall of steel rails which he and other labourers were trying to load from the ground upon a flat car. A rail while being raised struck the side of the car and fell back. The plaintiff was in-

¹ See per Lord Watson (1891), App. Cas. at 385, 386.

² 9 N. Z. L. R. 413.

³ L. c. per Williams, J., at 426. The judgment of this learned judge contains reference to and a discussion of all the authorities on the matter.

⁴ At 427.

⁵ (1893) App. Cas. 308.

⁶ L. c. at 311.

⁷ 20 Rettie 385.

⁸ *Coyne v. Union Pacific Railway Company*, 133 U. S. (26 Davis) 370.

jured. The negligence alleged was that the foreman, one McCormick, moved out the construction train to which the flat car belonged in the face of an approaching regular freight train, to avoid which the labourers were hurrying to load the rails. It was charged that the foreman failed to give the customary word of command to lift the rail in concert; but with the approaching freight train in sight, and with oaths and imprecations ordered the men to get the rail on in any way they could; they lifted it without concert; hence the accident. The Court were unanimous that no case was shewn. "The fact that McCormick hurried the men does not shew any negligence on his part or excuse any negligence on theirs. The necessity of keeping the construction train out of the way of the freight train was one of the risks of the employment. The use of oaths and imprecations by McCormick was not an element of negligence. The fact that McCormick urged the men to hasten, even if, as a consequence, the plaintiff and his fellow-workmen became confused and failed to act in concert, cannot be regarded as a fault or negligence in McCormick. Whatever negligence there was, was the negligence either of the plaintiff himself or of his fellow-servants, who, with him, had hold of the rail."¹

POSITION OF VOLUNTEERS.

Degg v. Midland Railway Company.

Degg v. Midland Railway Company² has already been alluded to as an authority for the proposition that the legal conception of fellow-servants, so far as the master's immunity for their negligence amongst themselves goes, is not limited by the fact of his payment and their receipt of wages. We are now to consider the class of cases, of which it is the leading authority, where persons unsolicited, and as volunteers, place themselves in the position of servants for the benefit of other persons.

Degg v. Midland Railway Company was an action under Lord Campbell's Act. The widow sued for damage caused by the death of her husband while assisting in the turning of a railway truck of the defendants. The deceased was engaged in unloading a truck upon a siding. Next to the truck was a turn-table, at which servants of the Company were attempting to turn a truck. The deceased, who was not in the employ of the Railway Company, went to their aid. Whilst he was there a steam-engine came into a siding, where the turn-table was, for the purpose of shunting some empty trucks. The deceased was struck, injured

¹ 133 U. S. (26 Davis) at 374.

² (1857) 1 H. & N. 773. A passer-by casually appealed to by a workman for information, does not make himself a volunteer by affording it. *Cleveland v. Spier*, 16 C. B. N. S. 399.

and ultimately died from the effects of the injuries he received. Bramwell, B., in giving judgment for the defendants, drew a distinction between injuries deliberately inflicted on trespassers¹ and injuries consequentially arising to them from their trespass. For instance, if a man steps on the rotten cover of a well while trespassing on another person's property and falls in,² no action would lie against the owner for having a rotten cover to his well. On the other hand, if a trespasser is walking in a park where the owner is driving, who, though seeing him, yet recklessly drives over him, despite his being a trespasser, the person injured could recover. "No man, by his wrongful act, can impose a duty, and as a direction by the master to drive furiously, or in any way called carelessly, in his park, would not be wrong in the master, it cannot be made so by a trespasser getting there and being hurt, so that *quoad* the master it is *damnum absque injuria*; and if not a wrong in the master when expressly ordered, it cannot be if done by the servant against his orders." The defendants might have directed their servants to act in the way they were doing, when the accident happened, without violating any duty, and the coming there of the deceased could not constitute a duty, so that the action was not maintainable.

Distinction between injuries directly inflicted on trespassers and those incidentally arising.

Potter *v.* Faulkner,³ in the Exchequer Chamber, distinctly affirms the principle of Degg *v.* Midland Railway Company, Potter *v.* Faulkner was decided on a special case, setting out that the plaintiff had been injured by the fall of a bale of cotton in the course of removing cotton from the warehouse of the defendant. Some of the servants of the defendant were employed in lowering bales of cotton from the warehouse, and another of the servants was receiving them into the defendant's cart. The plaintiff was waiting on the premises of the defendant for his turn to load his cart. He intervened to assist the servant who was in the cart, and, so far as the master was concerned, made himself a volunteer. A bale fell and injured him. The Queen's Bench, on the authority of Degg *v.* Midland Railway Company, and without hearing argument, held that the judge at the trial was bound to nonsuit, and suggested that the case should go to a court of error. In the Exchequer Chamber, Erle, C.J., formulated

Potter *v.* Faulkner.

¹ Deane *v.* Clayton, 7 Taunt. 489; Pott *v.* Wilkes, 3 B. & Ald. 304; Bird *v.* Holbrook, 4 Bing. 628; Lynch *v.* Nurdin, 1 Q. B. 29. As to this case, Erle, C.J., in Potter *v.* Faulkner, *infra* n.,³ said: "The law of England, in its care for human life, requires consummate caution in the person who deals with dangerous weapons. You may put aside that class of cases." Cp. *ante*, 178.

² *L. c.* at 777.

³ (1861) 1 B. & S. 800; Kelly *v.* Johnson, 128 Mass. 530; a Scotch case, Little *v.* Summerlee Iron and Coal Company, 17 Dunlop 310; and an Irish case, O'Sullivan *v.* O'Connor, 22 L. R. Ir. 467, in the C. A. 476. See also per Lord Gifford in Woodhead *v.* Gartness Mineral Company, 4 Rettie 469, at 503.

the principle that, in circumstances such as those proved, no one can "stand in a better position than those with whom he associates himself in respect of his master's liability; he can impose no greater obligation upon the master than that to which he was subject in respect of a servant in his actual employ."

Limitation on
the rule in
Degg v. Mid-
land Railway.
Holmes v.
North-Eastern
Railway
Company.

In *Holmes v. North-Eastern Railway Company*,¹ however, a limitation of the rule in *Degg v. Midland Railway Company* was imposed in favour of those who have a personal interest in the work at which they assist. It was the custom for waggons consigned to a certain station on the defendants' line, and containing coal or lime, to be shunted into a siding, and there unloaded by means of drops or cells into which the contents of the waggons were shot. It was also customary for the consignees of goods, or their servants, to assist in unloading; and for that purpose to pass along a flagged way, which was by the side of the shunted waggons and above the cells into which they were unloaded. A coal waggon consigned to the plaintiff, was shunted, but could not be immediately unloaded, as no drop was vacant. The plaintiff, being in want of coal, went to the station, and was told by the station-master that he could not get delivery till some lime was removed. Plaintiff said he must have the coal, and would get on the waggon and take what he needed thence. The station-master made no reply, and the plaintiff, with his servant, proceeded towards the waggon, got upon the buffer, took some coal, and descended on the flagged way. The flag being worn, broke; the plaintiff was thrown to the bottom of the cell and injured. A verdict was given in his favour and a rule to enter it for the defendants was discharged by the Court of Exchequer, on the ground that there was a duty on the defendants to keep the way in such a condition as to enable persons coming to assist in unloading the waggons in the ordinary way to pass safely; and that they were liable to such persons for the consequences of the insecurity of the flags; and further they were under a duty to the plaintiff when, instead of his unloading his waggon by tipping, he did the same thing by transferring the coals by hand from the waggon into his own cart. The Exchequer Chamber affirmed the Court of Exchequer without comment.

"Licensees"
and "mere
licensees."

In the Court of Exchequer, Bramwell and Channell, BB., drew a distinction similar to that drawn by Willes, J., in *Indermaur v. Dames*, between "licensees" and "mere licensees." By a "mere licensee" it appears is to be understood a person who has

¹ (1869), L. R. 4 Ex. 254, L. R. 6 Ex. 123. Cp. *Carroll v. Freeman*, 23 Ont. R. 283.

permission to go upon ground for his own purposes without any relation to the occupier, and who goes taking all the risks attending his so doing, and not imposing any liability on his licensor ;¹ by a licensee is to be understood one who is invited on land by the occupier for some purpose in which he and the occupier have some common interest. The two learned judges acquiesced in the decision of the Court with some little difficulty, not from dissent to the principle asserted, yet having doubts as to the correct application of the principle to the facts of the case. The principle may be stated thus : Where a person is on premises of others, with their assent, engaged in a transaction of common interest to both parties, the owners of the premises are liable for the negligence of their servants in the course of the transaction. Principle stated.

The Scotch case of *Wyllie v. Caledonian Railway Company*,² which was decided almost at the same time, and was somewhat similar in its facts, will yet be found on examination to be referable to another principle of law. A drover in the employment of a cattle-dealer was engaged along with the company's servants in trucking his master's cattle, when an engine, negligently driven by one of the company's servants, entered the siding where plaintiff was engaged, and injured him. The Lord President (Inglis) held, that the true effect of what was being done, taking into account the difficulty involved in driving cattle was that the railway company's servants were taking delivery in pursuance of the contract of carriage, and the servants of the cattle-dealer were engaged in giving delivery ; consequently a duty to take care was owing. This *ratio decidendi* seems satisfactory. Although the other English cases were cited in the argument, no mention appears to have been made of *Holmes v. North-Eastern Railway Company*, nor of the wider principle laid down in the *Exchequer*. The case clearly comes under the principle there advanced, of co-operation joined with an interest in the work. Wyllie v. Caledonian Railway Company.

Next came the case of *Wright v. London and North-Western Railway Company*.³ Plaintiff sent a heifer by defendants' train. On the arrival of the heifer at her destination there were not sufficient porters to shunt the box, in which the heifer had been carried, to a siding, from which only she could be delivered. The plaintiff went to assist, and by the negligence of the defendants' servants he was injured. The judgment of Mellish, L.J., varies, and in so doing explains, the phrase 'a mere licensee,' used by Wright v. London and North-Western Railway Company.

¹ *Bolch v. Smith*, 7 H. & N. 736.

² 9 Macph. 463 : *ante*, 817.

³ *Wright v. London and North-Western Railway Company* (1875), L. R. 10 Q. B. 298, 1 Q. B. Div. 252.

Distinction.

Channell, B., in *Holmes v. North-Eastern Railway Company*. "The plaintiff," he says,¹ "was not a mere volunteer, but was assisting to get his own heifer." The distinction to be drawn is, that where the company is doing its own work in its own way and some bystander is prompted to interfere from a motive peculiar to himself and not importing a duty, he does so at his own risk; if, however, a company allows persons to do what they ought to have an efficient staff to do, they must take the consequences if the person so interfering—supposing him to have an interest in the work—is injured.

The Scotch decision would seem in point here also, with the difference that there the drover was giving, here he was taking, delivery.

Little v.
Neilson.

In the Scotch case of *Little v. Neilson*,² defendant's manager asked the purser to turn out of the road and assist him, which he did, and, while rendering the aid asked, was injured; the Lord Justice-Clerk (Hope) found the claim relevant, on the ground that the manager was authorized to make the request. This was before the decision in *Bartonshill Coal Company v. Reid*. Since then, it would seem that, where such assistance is given at the request of the servants, the volunteer would by acting be constituted a fellow-servant, unless he acts in pursuance of an interest; and if he does not assist at the request of the servants, but from his own meddlesomeness only, his rights are no greater than a servant's.

Further
distinction.

A distinction must, nevertheless, be drawn between acts done with a view to assist, and acts done the effect of which is to assist, though no such object originally prompted them. The one class renders the persons acting a volunteer, the other does not. Thus it is pointed out³ that if a runaway horse is stopped by a person whose safety is jeopardized by its course, such person does not, by stopping the horse, become the servant of the owner. Nor, when a house is burning, does an imperilled neighbour lose his rights as a stranger by assisting to put out the fire.

Actions done for the purpose of protecting person or property will not be construed as done with any object inconsistent with that purpose. Difficulty, however, exists in determining the motive to action in these cases. The learned authors just cited suggest as one test—"to inquire whether the person rendering the assistance would probably have done so if the property with which he interfered had no owner." The test seems an unnecessary complication of the proposition that each case must be decided, as it arises, on its own facts.

¹ 1 Q. B. Div. at 256.² 17 Dunlop 310.³ Shearman and Redfield, *Negligence* (4th ed.), § 183.

An American case,¹ decided by the Supreme Court of Pennsylvania, forcibly sets out the considerations on which the law on the point we have been considering is based. A boy of ten was asked by a foreman watering an engine to fix the hose on the boiler while he cleaned out the ash-pan. Some trucks without a breaksman ran against the engine, threw the boy off, and killed him. Agnew, J., giving the judgment of the Court, said: "Here the boy was voluntarily where he had no right to be, and where he had no right to claim protection; where the company was in the use of its private ground, and was not abusing its privileges, or trespassing on the rights or immunities of the public. The only apology for his presence there, is the unauthorized request of one who could not delegate his duty, and had no excuse for visiting his principal with his own thoughtless and foolish act. Nor can the mere youth of the boy change the relations of the case. That might excuse him from concurring negligence, but cannot supply the place of negligence on the part of the company, or confer an authority on one who has none. It may excite our sympathy, but cannot create rights or duties which have no other foundation."

Flower v. Pennsylvania Railroad Company.

Judgment of Agnew, J.

LENDING SERVANTS.

*Murray v. Currie*² has already been cited for the proposition that, where the servants of a contractor co-operate with the servants of the common employer, and all act under the control and in the work of the contractor, the servants of the contractor cannot recover against the common employer for injuries sustained from the negligence of his servants while thus co-operating in the work of the contractor; neither can the servants of the common employer recover against the contractor for injuries sustained from the negligence of his servants while they are co-operating in carrying out his work. It is also an authority for the proposition that, "If I lend my servant to a contractor who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed. The servant is doing not my work but the work of the independent contractor."³ This proposition was subsequently affirmed in *Rourke v. White Moss Colliery Company*.⁴

Murray v. Currie.

The principle is well illustrated by a Massachusetts case.⁵ *Wood v. Cobb*. Plaintiff was injured by a boy in the general employment of the

¹ *Flower v. Pennsylvania Railroad Company* (1871), 69 Pa. St. 210.

² (1870) L. R. 6 C. P. 24.

³ *L. c.* per Brett, J., at 28.

⁴ 2 C. P. Div. 205. *C. P. Moore v. Palmer*, 2 Times L. R. 781 (C. A.); *Wallis v. Hine*, 4 Times L. R. 472 (C. A.).

⁵ *Wood v. Cobb*, 95 Mass. 58.

defendants. It was proved that defendants employed a "truck-man" to deliver their parcels once a week. He, being ill and unable to drive, sent up his team, and told the defendants they could have it if they wanted it, and would let their boy drive for him. The boy, on being asked, said he must ask the defendants, and the defendants said he might drive. Bigelow, C.J., on these facts, held, that at the time the injury was done to the plaintiff the person in charge of the horse and waggon "was not in the employment or service of the defendants, but was acting as the servant of a third person, who exercised an independent employment in no way subject to the command or control of the defendants as to the mode in which it should be carried on. It is too well settled to admit of debate that under such circumstances no liability for the acts done attached to the defendants."

Principle
expressed in
Kimball v.
Cushman.

This case is thus generalized in the subsequent *Massachusetts* case of *Kimball v. Cushman*:¹ "It is not necessary that he (the plaintiff) should be shewn to have been in the general employment of the defendant [in that case the special master was being sued], nor that he should be under any special engagement of service to him, or entitled to receive compensation from him directly. It is enough that, at the time of the accident, he was in charge of the defendant's property, by his assent and authority, engaged in his business, and, in respect of that property and business, under his control."

Effect of there
being an
intermediate
party between
the servant
and the person
sued as special
master.

Kimball v. Cushman may be cited also for the further proposition: "The fact that there is an intermediate party, in whose general employment the person, whose acts are in question, is engaged, does not prevent the principal from being held liable for the negligent conduct of the sub-agent or under-servant unless the relation of such intermediate party to the subject-matter of the business in which the under-servant is engaged, be such as to give him exclusive control of the means and manner of its accomplishment, and exclusive direction of the persons employed therefor."

LIABILITY OF SERVANTS.

Liability of
servants.
I. Personally
to strangers.

There remains to be considered the responsibilities incurred by servants either to strangers or one to another. Those obligations which the law imposes on all persons independently of contract can manifestly not be affected by the constitution of relations to which the injured person is not a consenting party; and as the servant is liable for any injury he may do to the person or property of another by force of his position as a member of the community and subject to its laws; so his own act in putting

¹ 103 Mass. 194, at 198. See also *Hasty v. Sears*, 157 Mass. 123, 24 Am. St. R. 267.

himself in relations of subordination to another will not excuse him from answering for the consequences of acts or omissions he would otherwise have been bound to.

The same considerations apply in the case of fellow-servants, and would need no exposition save for the decision of a well-known Massachusetts case, *Albro v. Jaquith*,¹ and for a *dictum* of Pollock, C.B., in *Southcote v. Stanley*.² II. To fellow-servants.

In the former, the Court held that the considerations that led to the adoption of the rule, "that a party who employs several persons in the conduct of some common enterprise or undertaking is not responsible to any of them for the injurious consequences of the mere negligence or carelessness of the others in the performance of their respective duties, have an equal significance and force when applied to actions brought for like causes by one servant against another." In the latter case,³ Pollock, C.B., says: "The rule [*i.e.*, that the servant undertakes to run all the ordinary risks of service, including those arising from the negligence of fellow-servants] applies to all the members of a domestic establishment, so that the master is not in general liable to a servant for injury resulting from the negligence of a fellow-servant; neither can one servant maintain an action against another for negligence whilst engaged in their common employment." Pollock, C.B.,
in *Southcote v. Stanley*.

These expressions of opinion have caused some uncertainty where else, both on principle and on authority, there is no room for doubt. On principle, the injuring servant can claim no greater rights under the contract than the master and the injured servant between whom the contract is made, yet for his own personal negligence the master is liable to the servant,⁴ while the negligent servant is liable to an action in respect of his negligence by his employer.⁵ This applies equally to the case of a paid servant or of a volunteer. The principle of law is "that, if a man has a peculiar knowledge, and he offers his services to another person, he is liable for gross negligence whilst performing his undertaking." Sir J. Hannen thus illustrates the principle in giving judgment in *The Rhosina*.⁶ "Suppose one coachman driving allows another coachman, whom he thinks knows the road perfectly well, to drive; he is a volunteer in that sense, and suppose he wishes to go at a greater speed than some other" Principle of
the servant's
liability for his
own acts.

Sir J. Hannen's
judgment in
the *Rhosina*.

¹ 70 Mass. 99. This decision has since been overruled in the same State, *Osborne v. Morgan*, 130 Mass. 102, where numerous authorities are cited.

² 1 H. & N. 247.

³ *Southcote v. Stanley*, 1 H. & N. 247, at 250.

⁴ Per Lord Cranworth, C., in *Brydon v. Stewart*, 2 Macq. (H. L. Sc.) 30, at 37; and see *Roberts v. Smith*, 2 H. & N. 213.

⁵ *Green v. New River Company*, 4 T. R. 589.

⁶ 10 P. D. 24, at 29, affirmed 131.

vehicle on the road, and in attempting to get past drives over a heap of stones and upsets the coach, he will not be excused by saying, 'I was only a volunteer.' "

Sir J. Hannen's use of the term "gross negligence" in this connection.

Note may be taken of the use by Sir J. Hannen of the phrase "gross negligence." This cannot be taken to imply any difference in degree between the negligence which would suffice to charge the man if driving on his own account and his negligence when volunteering for another, so far, that is, as any third person injured is concerned. The character of his liability to the coachman for whom he undertook to drive would vary with the different aspect the circumstances might bear. If the supposition that he knew the road "perfectly well" were gratuitous, then the test of liability would be "gross negligence"—the negligence of an unskilled person *quod* knowledge of the road, but the negligence of a skilled person *quod* the fact that he was a coachman. If, on the other hand, he had represented that he knew the road "perfectly well," then *Spondet peritiam artis*,¹ he would be liable for slight negligence—want of the skill of an expert whether the service he professed to render were gratuitous or remunerated is altogether immaterial to the founding of liability.²

Authorities.

The authorities on the point of the servant's liability for his own negligence are, moreover, both numerous and conclusive. It will suffice to call special attention to one of the earliest assertions of this liability by Lord Kenyon in *Stone v. Cartwright*,³ where he says: "There is no pretence whatever for imputing liability to the defendant in this action; it might as well be contended that a similar action would lie against the steward of another for all the defaults of improper conduct of the men employed under him by which any other person received damage. In all these cases I have ever understood that the action must be brought either against the hand committing the injury, or against the owner for whom the act was done"; and to one of the most emphatic of the latest, when Bramwell, L.J., giving evidence before the House of Commons' Committee on the Employers' Liability, said: "A workman would undoubtedly be able to maintain an action against the fellow-workman who had done the mischief if he were worth suing."⁴

¹ *Ante*, 653.

² *Shiells v. Blackburne*, 1 H. Bl. 158 at 161.

³ 6 T. R. 411. See per Kelly, C.B., *Weir v. Barnett*, 3 Ex. D. 32, at 40, and *Wilson v. Peto*, 6 Moore (C. P.) 47, as to the limitation of the principle.

⁴ Parliamentary Papers, 1877, vol. x. quest. 1156.

⁵ For other authorities see *Laugher v. Pointer*, 5 B. & C. 547, per Littledale, J., at 558; *Wiggett v. Fox*, 11 Ex. 832, per Alderson, B., at 839; *Morgan v. Vale of Neath Railway Company*, 5 B. & S. 570, per Blackburn, J., at 578, in Ex. Ch. 736; *Swainson v. North-Eastern Railway Company*, 3 Ex. D. 341, per Pollock, B., at 344; Wharton, *Negligence* (2nd ed.), § 245; *Shearman and Redfield, Negligence* (4th ed.), § 245; the judgment of Gray, C.J., in *Osborne v. Morgan*, 130 Mass. 102; *Hare v. McIntire* 82, Me. 240, 17 Am. St. R. 476; and *Mackenzie v. Goldie*, 4 Macph. 277.

CHAPTER VI.

THE EMPLOYERS' LIABILITY ACT, 1880.

(43 & 44 Vict. c. 42.)

THE common law as applied to the relation of master and servant, and as developed in the preceding chapters, may shortly be stated in the following proposition: A master is not liable to any servant for any injury which arises from the act or default of any fellow-servant, whether that fellow-servant be in a position of authority or not; and, in ascertaining whether the person to whose act or default the injury is due is a fellow-servant, the widest possible construction is given to the term "common employment."¹ To this governing principle there are certain exceptions; for the servant is held to be saved from the operation of the general rule, and to have his action, if he shews either—

Proposition
stating the
common law.

First, that the master has omitted to provide suitable materials and facilities for the work; or,

Exceptions.

Secondly, that the master has been in default in engaging incompetent workmen through whose incompetence the injury happens; or

Thirdly, that the master has personally been guilty of the negligence that causes the injury.

In 1876 a Committee of the House of Commons was appointed to inquire into the legal relations of master and servant with regard to injuries suffered by servants in the course of their employment. The Committee was reappointed in the following session, and ultimately reported in favour of amending the common law in two particulars:

House of
Commons'
Committee on
Employers'
Liability.

First, in order to render the master liable in cases where he has delegated his authority.

Secondly, in order to narrow the doctrine of common employment to those cases where each servant is an observer of the conduct of the other, and can give notice of any misconduct,

Amendments
suggested by
their Report.

¹ Report of House of Commons' Committee on Employers' Liability, Parliamentary Papers, 1877, vol. x. iii.

incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require.

The outcome of this Report was the Employers' Liability Act, 1880, which we are now to consider.¹

Governing
principle of the
Employers'
Liability Act,
1880.

The governing principle of the Act is that, in certain circumstances, presently to be considered, a workman² "shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

It has been decided, and perhaps somewhat superfluously reported, that "the relation of employer and employed" must exist, and be set forth by the pursuer, to warrant action under the Act;³ and further, "that the Act has no application where a man is conducting his own business, and where the fault, if any, is imputable to himself;"⁴ or where the injury arises from pure accident,⁵ even though the possibility of the occurrence of such an injury might be obviated by extreme precautions.⁶

Objects of the
Act.
Lord Young
in *Morrison*
v. Baird.

The object of the statute has been most diversely regarded. The most accurate estimate of its scope is that of Lord Young in *Morrison v. Baird & Co.*,⁷ where he says that the Employers' Liability Act "does no more than remove a defence, in the class of actions to which it refers, which was theretofore competent, by providing that an employer against whom such action is raised shall not, in certain circumstances specified in the statute, be entitled to plead what the common law entitled him to plead—that he is not responsible to one employee for the fault of others. The statute does no more than remove that defence in certain specified circumstances"; or, as it is put by Smith, J., in *Weblin v. Ballard*,⁸ "That the workman, when he sues his master under the provisions of the Act for any of the five matters designated

Weblin v.
Ballard.

¹ 43 & 44 Vict. 42. The English Act is in substance enacted in New South Wales (46 Vict. No. 6), with the addition of a section amending or dispensing with notices; in Queensland, 50 Vict. No. 24, with one forbidding contracts to exclude the Act; in Victoria, 50 Vict. No. 894, in terms almost identical with the Act of the United Kingdom. In Ontario, an Act very similar to the Bill of 1888 in the Parliament of the United Kingdom is in force (49 Vict. cap. 28). In New Zealand the Act is 46 Vict. No. 20, and applies to Crown servants. The old rule as to common employment seems still to prevail in Quebec, New Brunswick, and Nova Scotia.

² Section 1. *Thomas v. The Great Western Colliery Company*, 10 Times L. R. 244.

³ *Nicolson v. M'Andrew*, 15 Rettie 854; *Sweeney v. Duncan*, 19 Rettie 870.

⁴ Per Lord Young, *Bruce v. Barclay*, 17 Rettie 811, at 814.

⁵ *Callender v. The Carlton Iron Company, Limited*, 9 Times L. R. 646 (C. A.), 10 Times L. R. 366 (H. L.). *Ante*, 651, 670.

⁶ *Thomson v. Dick*, 19 Rettie 804.

⁷ 10 Rettie 271, at 278; *M'Avoy v. Young's Paraffin Company*, 9 Rettie 100; *Dailly v. Beattie*, 20 Sc. L. R. 92. *Morrison v. Scottish Employers' Liability and Accident Assurance Company*, 16 Rettie 212, where a question of what is an insurance under the Act arose.

⁸ 17 Q. B. D. 122, at 125.

in it, shall be in the position of one of the public suing, and shall not be in the position a servant theretofore was when he sued his master; in other words, that the master shall have all the defences he theretofore had against any one of the public suing him, but shall not have the *special* defences he theretofore had when sued by his servant." The same learned judge, in the same judgment,¹ states that he regards the result of this to be that "the defence of common employment, and also the defence that the servant had contracted to take upon himself the known risks attending upon the engagement are taken away from him [the employer] when sued by a workman under the Act." To the same effect is Lord Esher, M.R.:² "It has been suggested that this Act has only the effect of doing away with the doctrine of the immunity of the master from damage arising from the negligence of another servant in the common employment of the master. To my mind it is clear that the statute has taken away from the master another defence"—that the servant undertook to take all the ordinary risks incident to the employment, unless they were concealed or known to the master and not to the servant.³ It is apparent, notwithstanding, on consideration that the Act has not "the effect of doing away with the doctrine of the immunity of the master for damage arising from the negligence of another servant," otherwise the limitations in sub-sections 2, 3, 4, and 5 of section 1 would be unnecessary;⁴ while the operation of the sub-sections is to do away with so much of the "doctrine," &c., as is included within their scope, and the absence of any other legislation leaves what is not included within them till subsisting.

Lord Esher,
M.R., in
Thomas v.
Quartermaine.

As to the second alleged operation of the Act—that "it has taken away the defence from the master that the man undertook to take all the ordinary risks incident thereto," on the assumption that this is so, it is curious to note that the objects laid down by the House of Commons' Committee's Report on the Employers' Liability specifically exclude this. The suggestion was to narrow the doctrine of common employment to those cases where each servant "is an observer of the conduct of the other, can give notice of any misconduct, incapacity, or neglect of duty, and

Effect on the
defence that
the workman
undertook the
risks of the
employment.

¹ *L. c.* at 125.

² *Thomas v. Quartermaine*, 18 Q. B. Div. 685, at 688.

³ Lord Esher, M.R., in *Yarmouth v. France*, 19 Q. B. D. 647, at 653, 654, says: "I never entertained a doubt that the Employers' Liability Act does not prevent the proper application of the maxim, *Volenti non fit injuria*; and I can only say, as an excuse for the part I took in *Thomas v. Quartermaine*, that that doctrine had never been mentioned on the argument of that case, but was for the first time suggested in the judgment of my brother Bowen."

⁴ *M'Giffin v. Palmer's Shipbuilding Company*, 10 Q. B. D. 5; *Shaffers v. General Steam Navigation Company*, 10 Q. B. D. 356; *Kellard v. Rooke*, 19 Q. B. D. 585, 21 Q. B. Div. 367.

leave the service if the common employer will not take such precaution and employ such agents as the safety of the whole party may require.”¹

View of the
majority of the
Court of
Appeal in
Thomas v.
Quartermaine.
Bowen, L.J.

Moreover, the judgment of the majority of the Court in Thomas v. Quartermaine² establishes that the view of Lord Esher, M.R., is not a correct reading of the Act.³ “An enactment,” says Bowen, L.J.,⁴ quoting the 1st section, “which distinctly declares that the workman is to have the same rights as if he were not a workman, cannot, except by violent distention of its terms, be strained into an enactment that the workman is to have the same rights as if he were not a workman and other rights in addition. It cannot in the case of a defect in the employer’s works be distorted into the meaning that a new standard of duty is to be imposed on the employer as regards a workman which would not exist as regards anybody else. If the language of the section were not even so precise, the point would be concluded, one might well think, by the observation that if the Act had intended to prescribe some new measure of duty the least one might expect would be that it should define it.” Fry, L.J., adds:⁵ “If the workman is to have the same rights as if he were not a workman, whose rights is he to have? Who are we to suppose him to be? I think that we ought to consider him to be a member of the public entering on the defendant’s property by his invitation. Can such a person maintain an action in respect of an injury arising from a defect, of which defect and of the resulting damage he was as well informed as the defendant? I think not. To such a person it appears to me that the maxim *Volenti non fit injuria* applies.”⁶

The common law doctrine may be taken from the statement of Lord Esher, M.R.:⁷ “Before the Employers’ Liability Act there was this condition in the contract of hiring, that, if there was a defect in the premises or machinery which was open and palpable, whether the servant actually knew it or not, he accepted the employment subject to the risk.” There are, doubtless, expressions by other judges, and by the same judge in other cases,

¹ These words are adopted by the Committee from the judgment of Shaw, C.J., in Farwell v. Boston Railroad Corporation, 3 Macq. (H. L. Sc.) 316, at 319.

² 18 Q. B. Div. 685, at 692.

³ The New South Wales case of Simat v. Silva, 8 N. S. W. R. (Law) 415, is at common law, and holds that, where a plaintiff’s knowledge is equal to the defendant’s, the rule involved in *Volenti non fit injuria* applies. There the plaintiff was the engineer of a steam-tug.

⁴ 18 Q. B. Div. at 692.

⁵ L. c. at 700.

⁶ The Supreme Court of Victoria had previously arrived at the same conclusion: Davidson v. Wright, 13 Vict. L. R. 351. See, too, the Scotch cases, M’Avoy v. Young’s Paraffin Company, 9 Rettie 100; Morrison v. Baird, 10 Rettie 271; Robertson v. Russell, 12 Rettie 634.

⁷ Yarmouth v. France, 19 Q. B. D. 647, at 653.

superficially at variance with this, which have been elsewhere collected and considered,¹ but subject to the minuter distinction there considered in full the outcome of the principle is as thus stated. What, then, is the effect worked by the Employers' Liability Act on the principles of the common law?

We have already seen that the central conception of the Employers' Liability Act, 1880, is to place the workman in the same position with regard to the employer, in certain enumerated circumstances, as would be held by any person not in the employment suffering injury. Scope of the Act.

The consideration of the definition of a workman under the Act, will for the present be deferred; and we shall now proceed to consider the way in which the common law is affected by the Act.

The workman is to be in the same position as "if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work"²—in other words, he is to be in the same position as if he were a licensee³—where the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, where the defect arose from or had not been discovered or remedied owing to—

1. Workman to recover where the injury is caused by defect in the condition of ways, works, machinery, or plant, &c.

1. The negligence of the employer.⁴

2. The negligence of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.⁵

To give a right of action it is therefore necessary to shew a defect in some of the specified appliances. In *Heske v. Samuelson*,⁶ Lord Coleridge, C.J., suggests, as a test of a defect in the condition of the thing complained of, the question whether it "was not in a proper condition for the purpose for which it was applied." This was adopted by the Court of Appeal in *Cripps v.*

¹ *Ante*, 764-783.

² Sec. 1, sub-sec. 1.

³ Per Bowen, L.J., *Thomas v. Quartermaine*, 18 Q. B. Div. at 693.

⁴ In *Roberts and Wallace's Employers' Liability* (3rd ed.), 208, it is pointed out that the Act makes no pretence of dealing with the employer's own personal liability, and the suggestion is made that probably these words were inserted to enable the workman to recover more than £50 against the employer in a county court, and not drive him to a second action in the High Court, if at the trial the fact shewed a common law liability merely. Messrs Spens and Younger's national feeling will not admit this suggestion, since the reason for it is not applicable to the Sheriff Courts of Scotland: *Law of Employer and Employed*, 183. Their alternative suggestion seems intrinsically the more probable one.

⁵ Sec. 2, sub-sec. 1. See *Thomas v. The Great Western Colliery Company*, 10 Times L. R. 244.

⁶ 12 Q. B. D. 30. The facts in *Murray v. Merry*, 17 Rettie 815, are somewhat similar, though the conclusion is different. *Corcoran v. East Surrey Iron Works*, 5 Times L. R. 103, where a trolley "was in the usual form, and it was admitted that there was no danger if the stanchions were packed as usual." *Finlay v. Miscampbell*, 20 Ont. R. 29.

Judge.¹ Thus, where a crane was used to tear up sleepers, and injury resulted, there was held to be defect in the condition of the machine.²

Walsh v.
Whiteley.

In Walsh v. Whiteley³ there was a division of opinion of the Court of Appeal on the question as to what constituted evidence of defect in the condition of a machine. The county court judge had left it to the jury to say whether there was in fact a defect in the condition of the machine—a carding machine, the disc of the wheel of which was not solid throughout; had the disc been solid the accident would not have happened—telling them that to be defective it must be such as a reasonable, careful, experienced man, reasonably careful of the safety of his workmen, would not use. The jury found a defect, and on appeal, Wills, J., was of opinion that there was evidence to warrant the conclusion, Grantham, J., being of the contrary opinion. Lord Esher, M.R., expressed his view as follows: “The true question seems to me to be whether the machine is dangerous, and whether a careful consideration would shew it to be dangerous to the workmen using it. I am prepared to say that if a careful consideration would shew a master that the machine was dangerous to the workman using it, even although that machine could not be improved upon, it is negligence on the part of the master to use for his profit a machine which is dangerous to his workman, and, if he does use it, he can only do so upon the terms of being liable to pay compensation to the workman, if he is thereby injured.”

View of Lord
Esher, M.R.

Judgment of
the majority
of the Court.

The proposition adopted by the majority of the Court (Lindley and Lopes, L.JJ.) was: “We think there must be a defect implying negligence in the employer. The negligence of the employer appears to be a necessary element without which the workman is not to be entitled to any compensation or remedy. It must be a defect in the condition of the machine, having regard to the use to which it is to be applied or to the mode in which it is to be used. It may be a defect either in the original construction of the machine, or a defect arising from its not being kept up to the mark,⁶ but it is essential that there should be

¹ 13 Q. B. Div. 583.

² Welsh v. Moir, 12 Rettie 590. Cp. Bacon v. Dawes, 3 Times L. R. 557.

³ 21 Q. B. Div. 371. Smith v. Harrison, 5 Times L. R. 406. Cp. Morgan v. Hutchings, 6 Times L. R. 219 and the comment on the decision, *post*, 843. In Scotland the pursuer must aver specifically in what respect the ways, works, &c., are insufficient or defective: Waterson v. Murray, 21 Sc. L. R. 695. Cp. M’Cloyerty v. The Gale Manufacturing Company, 19 Ont. App. 117; Southern Pacific Company v. Seley, 152 U. S. (45 Davis) 145.

⁴ 21 Q. B. Div. at 376.

⁵ L. c. at 378.

⁶ As an instance how judicial interpretation differs sometimes from the legislative conception of a measure, the following quotation from the *Times*’ newspaper report of the discussion in the House of Commons’ Committee on the Employers’ Liability Bill under date 4th August 1880, may be noted:—“Lord R. Churchill asked whether a farmer

evidence of negligence of the employer, or some person in his service entrusted with the duty of seeing that the machine is in proper condition."

The basis of Lord Esher, M.R.'s, argument is derived from the analogy of the law of locomotive engines;¹ but there must be a not inconsiderable difference between the principle on which a man is answerable for interfering with another's property, and that on which he is answerable for another's dealings with his own property; indeed, points of difference seem more prominent than points of resemblance.

Lord Esher,
M.R.'s, view
considered.

The effect of adopting the principle contended for by Lord Esher, M.R., would, using an illustration given by Lopes, L.J.,² involve the consequence that giving a workman "an ordinary sharp knife"³ with which he managed to cut himself would import liability. Apart altogether from the argument by *reductio ad absurdum*, the Act, as we have seen,⁴ requires negligence either of the employer or of a supervisor in his employment. In the opinion of Lord Esher, M.R., the use of a dangerous machine is equivalent to negligence, and the question of negligence is for the jury. This, at least, is not the common law, by which, "all that the master is bound to do is to provide machinery fit and proper for the work, and to take care to have it superintended by himself or by his workmen in a fit and proper manner."⁵ At common law, then, the matter for the consideration of the jury is not whether the machinery is dangerous, and therefore defective, but whether the machinery, even if dangerous, is "fit and proper for the work," and is properly superintended. "Defective" is not inclusive of "dangerous" at common law. What ground, then, exists for putting a different meaning on the term under the Act? for nowhere is there any different meaning given to it by the Act,

would be liable if his servant were injured while riding a horse which, to the knowledge of the owner, was afflicted with nervous disease, or disease in the foot. The Solicitor-General (Sir F. Herschell) said the employer in that case would not be liable, *as the disease would not have arisen from his neglect.*"

¹ 21 Q. B. Div. at 375. Apparently referring to *Jones v. Festiniog Railway Company*, L. R. 3 Q. B. 733, and *Powell v. Fall*, 5 Q. B. Div. 597. If so "the true test" was not "whether a careful man would have seen that it was an engine which would emit sparks," or the cases were decided on the well-worn rule laid down in *Fletcher v. Rylands*: see per Blackburn, J., L. R. 3 Q. B. at 736, and per Mellor, J., 5 Q. B. D. at 600.

² 21 Q. B. Div. at 379.

³ L. c. at 379.

⁴ Sec. 2, sub-sec. 1.

⁵ Per Lord Wensleydale, *Weems v. Mathieson*, 4 Macq. (H. L. Sc.) 215, at 227; *Ovington v. M'Vicar*, 2 Macph. 1066; *Macfarlane v. Thompson*, 12 Rettie 232; *Mulligan v. M'Alpine*, 15 Rettie 789. *Ante* 740, in *Howson v. Barrett*, 4 Times L. R. 449 (C. A.), the Lord Chancellor propounded the question whether machinery which had been safely used for three years could be called defective. The point, however, was not decided, the case turning on the facts, though an absolute obligation to have the best machinery was negatived. Absence of an accident may be equally consistent with fortunate negligence as with unfortunate diligence.

and nowhere in the Act is the word used in a sense inconsistent with its accustomed usage.

Defect and defective condition.
M'Giffin v. Palmer's Shipbuilding Company.

In *M'Giffin v. Palmer's Shipbuilding Company*¹ the question arose whether the Act drew a distinction between a "defect" merely and a "defect in the condition" of the ways, &c. A workman was employed in the defendants' iron-works, whose duty it was to take puddled iron, while still at a white heat, upon a two-wheeled car, drawn by hand, along a roadway of iron plates to a steam hammer. While so engaged the car struck against a piece of substance, used for lining the furnaces, which had got upon the roadway; some of the iron fell upon the workman, who was killed. The Court (Field and Stephen, JJ.) held that there was not "a defect in the condition" of the way. "A defect," said Stephen, J.,² "in the machinery would be the absence of some part of the machinery, or a crack, or anything of that kind. A defect in the condition of the way, or works, or machinery, or plant, is certainly wider, but I do not think it is very much wider. It means, I should be inclined to say, such a state of things that the power and quality of the subject to which the word 'condition' is applied are for the time being altered in such a manner as to interfere with their use. For instance, if the way is made to be muddy by water, or if it is made slippery by ice, in either of these cases I should say that the way itself is not defective, but the condition of the way, by reason of the water which is incorporated with it, or from its being in a freezing state, is affected." Or, as Field, J., said with regard to the same illustration:³ "That would be a defect in the condition of the way, because the way is the thing which people walk upon, and the thing itself is actually altered."

Mitchell v. Coats Iron and Steel Company.

The Scotch case of *Mitchell v. Coats Iron and Steel Company*,⁴ in which *M'Giffin's* case was cited, seems to lean to a different view, as the employer was held liable for an injury arising through a bar of iron projecting over the way where the injured man was. The Lord Justice-Clerk (Moncreiff), however, said: "We have had difficulty and some difference of opinion in arriving at a decision in the present case. But on the whole matter we are not inclined to disturb the judgment of the sheriff." So that in any view the decision is not of high authority. The subsequent case of *M'Quade v. Dixon*⁵ leaves the point open, for there the decision is that when an obstruction is taken off and

M'Quade v. Dixon.

¹ 10 Q. B. D. 5. Cp. *Thomas v. Quartermaine*, 17 Q. B. D. 414, at 417, per Wills, J.; also *Pratt v. Inhabitants of Weymouth*, 147 Mass. 245, 9 Am. St. R. 691.

² 10 Q. B. D. at 9.

³ *L. c.* at 8.

⁴ 23 Sc. L. R. 108.

⁵ 24 Sc. L. R. 727.

put by the side of a way, and there causes injury, the employer is not liable.¹ The distinction between the two cases must be noted to be that, in the case where liability was held to exist, the obstruction was *on* the way; in the other case only *by the side* of it.²

In England, M'Giffin's case was followed in *Pegram v. Dixon*,³ and it must be taken that the defect in the condition of any of the specified particulars must be of a permanent or *quasi*-permanent nature.

This is pointed out by the Court of Appeal in *Willetts v. Watt*.⁴ A way was constructed to serve a twofold purpose. Its usual function was to serve for purposes of passage; when, however, a lid was removed in the surface there was a well or catch-pit disclosed. The construction was proper for both purposes. It was accordingly held by the Court of Appeal that an accident arising from a workman falling down the well did not arise from "defect in the condition of the way," but rather from a negligent user of it. "It appears to me," said Fry, L.J.,⁵ "that the language of sub-s. 1 points to a defect of a chronic character and not to a defect arising from negligent user, and that view is supported by the judgment of the majority of this Court in *Walsh v. Whiteley*,⁶ where a defect of condition is contrasted with negligent user." In the particular case of *Willetts v. Watt*⁴ the plaintiff was unable to avail himself of this alternative stating of his cause of action, since the particulars were limited to sec. 1 sub-sec. 1. Under sec. 1 sub-sec. 1 it was held, in *Morgan v. Hutchins*,⁷ that the fact that a machine is danger-

¹ *L.c.*, see per Lord Young.

² In the English case of *Wood v. Dorrall*, 2 Times L. R. 550, the injury was caused by the absence of a rail to a staircase, which left an opening through which the plaintiff fell; this was held to be a defect in the condition of the way; and rightly, since the sides are as much part of the way as the ground. Spens and Younger, *Law of Employer and Employed*, 200, are of opinion that the decision in *Mitchell v. Coats Iron and Steel Company* "must be held in Scotland to overrule the judgment, if given, in the case of *M'Giffin*." 23 Sc. L. R. 108.

³ 55 L. J. Q. B. 447, the case of a boy throwing a board down an opening through which workmen ascended to the upper portion of a building, the opening having been previously used for the purpose. See *Conway v. Clemence*, 2 Times L. R. 80; *Ayres v. Bull*, 5 Times L. R. 202.

⁴ (1892) 2 Q. B. 92. Cp. *Moore v. Ross*, 17 Rettie 796, where Lord M'Laren, at 799, speaking of "known danger," says: "One class of cases of this sort is where the master by the adoption of some known and suitable appliance may diminish the danger to his servants, and does not adopt it; in such cases, the rule of the statute as to injuries resulting from defects in the ways, works, or plant, will probably apply. But the other class of cases is where the danger is one against which it is perfectly in the power of the servant to guard himself, simply by keeping his eyes open. That is the typical case in which the law says the servant must take the consequences of his own neglect"; and *Forsyth v. Ramage*, 18 Rettie 21. See *ante*, 758.

⁵ (1892) 2 Q. B. at 100.

⁶ 21 Q. B. Div. 371.

⁷ 38 W. R. 412. As to defect in the condition of a deck, see per Lord Lee, *Gray v. Thomson*, 17 Rettie 200.

ous, that is "defective with regard to the safety of the workman" who uses it, is a "defect in the condition of the machinery" which entitles the workman to recover damages against his employer for an injury caused by the machine even though it is effective for the purpose for which it is used.¹ The Court which decided this protested that they were not going to act against the decision of the Court of Appeal in *Walsh v. Whiteley*; yet it is difficult to reconcile their decision with the decision of the majority in that case, where it was said: "It is said there is evidence of the machine being dangerous. So are most machines, so is even an ordinarily sharp knife, unless used with care, but that does not make it defective in its condition, nor does it imply negligence in the employer, if an accident happens, who furnishes it to his workman for him to use with reasonable care."

Defect connected with or used in the business of the employer.
Howe v. Finch.

The defect must further be in the condition of ways, &c., "connected with or used in the business of the employer." This is pointed out in *Howe v. Finch*,² where it was sought to recover for injury caused by the fall of a wall forming part of the defendant's works, and which wall at the time of the accident had not been completed, and had never been used, though it was intended to be used for the business. The Divisional Court held the plaintiff not entitled to recover. "Ways," says Smith, J.,³ "means the ways used in the business, not partly made ways not used. If that is to be so as to 'ways,' it is so as to 'works,' I do not agree that if a whole structure fell or caused damage to a workman he would not have a right of action, for I think that he would. But here it was partly finished. I think 'ways, works, &c.,' mean the existing and completed works."⁴

"Ways."

"Works."

Effect of the decision.

This decision relates to an action brought under the Employers' Liability Act, and extends to the case of machinery, &c., brought into a place for the purpose of being used, though not fixed for use. At common law, there is a liability, either arising from want of ordinary and reasonable care or from injuries caused by patent defects. This does not extend to a case where danger had existed, and where the master had been notified that the dangerous element was removed before the accident by some competent man retained by him for the purpose of investigating

¹ *Stanton v. Scrutton*, 9 Times L. R. 236, is decided "in accordance with the decision of the Law Lords in *Smith v. Baker* (1891), App. Cas. 325, and especially the judgment of Lord Halsbury."

² 17 Q. B. D. 187. In *Brannigan v. Robinson*, 1892 (1 Q. B.), 344, the injured man was not engaged upon pulling down a wall, but was injured by an unsafe wall while he was otherwise employed than attending to it, and so the case is within *Smith v. Baker* (1891), App. Cas. 325. The work was done in an unsafe way, and was not in its nature unsafe. Cp. *Nordheimer v. Alexander*, 19 Can. S. C. R. 248. *Ante*, 768.

³ 17 Q. B. D. 187, at 190.

⁴ See *Conway v. Clemence*, 2 Times L. R. 80.

and seeing to a remedy, and where the danger was not apparent;¹ nor to the case where the very nature of the work manifestly involves considerable risk, as in securing a tottering wall, and the accident happens in the circumstances connoting the risk.²

Where a heavy machine had to be moved over an uneven depression which was filled in with slips of wood covered by a thin covering of iron, and in moving the slips of wood gave way, and an accident resulted, the Second Division of the Scotch Court of Session held that there was a defect in the condition of a way.³ In a somewhat similar case, where the plaintiff came out of a mill-yard where she was engaged, and was obliged to pass over a hole in the ground where a weighing machine was being set up, and over which certain planks were placed, one of which, being loose, tipped up as she stepped on it, and caused her injury, the Court of Appeal held that "the place was a 'way' within the meaning of the sub-section, and the way was defective, and defective owing to the negligence of the defendants, and the defendants were liable."⁴

In *Willetts v. Watt*⁵ the Court of Appeal disagreed with the limited construction of the term "ways" by the Divisional Court. The Divisional Court (Hawkins and Wills, JJ.), putting a somewhat forced construction on the language of Field, J., in *M'Giffin v. Palmer's Shipbuilding Company*,⁶ held that to constitute a "way" there must be a "defined way," and one "habitually used" as such. "The second of these arguments," says Lord Esher, M.R.,⁷ referring to the requirement of an habitual use, "is not tenable, for if it were the Act would not apply to the first user of a way, however defined it might be, but would only apply after considerable user of it. I cannot, therefore, regard habitual user as necessary. Nor do I think that it is necessary the way should be marked out and defined. If a way passes where the user would make no mark and where there are no defined boundaries, is it to be said that is not a way within the Act? Difficulties in so holding have been pointed out in the course of the argument, and I cannot come to that conclusion. The definition which strikes me as

¹ Cp. *Kiddle v. Lovett*, 16 Q. B. D. 605; *Kettlewell v. Paterson*, 24 So. L. R. 95.

² See per Day, J., in *Griffiths v. London and St. Katharine Docks Company*, 12 Q. B. D. 493; *Ugden v. Rummens*, 3 F. & F. 751. Also the Scotch cases, *Fraser v. Hood*, 15 Rettie 178, where a stableman, who undertook the care of a horse that he knew to be vicious, was disentitled to recover for injuries received from it. As to this *quære* and see *ante*, 755; and *Mulligan v. M'Alpine*, 15 Rettie 789, a defective system of blasting; also *Elliott v. Tempest*, 5 Times L. R. 154; *Moore v. Gimson*, 5 Times L. R. 177.

³ *Bowie v. Rankin*, 13 Rettie 981.

⁴ *Bromley v. Cavendish Spinning Company*, 2 Times L. R. 881 (C. A.)

⁵ (1892) 2 Q. B. 92.

⁶ 10 Q. B. D. 5, at 8.

⁷ (1892) 2 Q. B. 92, at 97.

sufficient for the determination of this case is—the course which a workman would in ordinary circumstances take in order to go from one part of a shop, where a part of the business is done, to another part where business is done, when the business of the employer requires him to do so, must be regarded as a ‘way’ within the meaning of the statute.”

Defect in the
condition of
machinery.
Machine.

The cases on defects in the condition of machinery have already incidentally been treated.

Johnson v.
Mitchell.

A machine has been defined to include “every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result”;¹ it is defective in its condition if it is not in a proper condition for the purpose for which it was applied.² This is well illustrated in the Scotch case of *Johnson v. Mitchell*,³ which was an action to recover damages for injuries sustained by crushing a hand while shutting a sliding door on the occasion of an alarm of fire. It was proved that the door was constructed for the purpose of preventing fire communication from one room to another, and that, when hastily closed, it would run on till brought up by the handle. The Court held the plaintiff entitled to recover, on the ground that the door, if shut quietly and deliberately, could hurt no one, and if plaintiff had looked to see how the door shut there would have been no chance of danger; yet, as the door was intended to be used on the occasion of a sudden fire, when people act very hurriedly, its construction was not suitable for the purpose for which it was to be applied.

Distinction
between defect
in the condi-
tion of a
machine and
defective
result from
working.

In *Bacon v. Dawes*⁴ a difference was relied on between a defect in the condition of a machine and a defective result from working it caused by the negligence of the man in charge of it. This may well be. In the case in question, however, the evidence pointed to a defect in the machine itself, which was held to be within the Act. The jury found that the injury was caused by defective pressure in the machine, and their finding was held to warrant a verdict for the plaintiff.

Defect in the
condition of
plant.

In a Canadian case⁵ want of a guard to a saw was held not a defect in the condition of a saw, “when such guard was no part of the saw, nor of the machinery connected therewith, nor at all necessary for any proper or reasonable fitness of the saw for the

¹ *Corning v. Burden*, 15 How. (U. S.) 252, at 267.

² *Paley v. Garnett*, 16 Q. B. D. 52. Cp. *Walsh v. Whiteley*, 21 Q. B. Div. 371; *Baxter v. Wyman*, 4 Times L. R. 255. Where the evidence shewed that a machine was the one in general use, it was held that its particular construction was not a defect: *Claxton v. Mowlem*, 4 Times L. R. 756; *Race v. Harrison*, 9 Times L. R. 567, 10 Times L. R. 92 (C. A.); *Gill v. Thorneycroft*, 10 Times L. R. 316.

³ 22 Sc. L. R. 698.

⁴ 3 Times L. R. 557.

⁵ *Hamilton v. Groesbeck*, 19 Ont. R. 76.

purpose for which it was used." But Lords Coleridge and Esher, sitting as a Divisional Court, are reported to have said, in *Morgan v. Hutchings*,¹ a case which has already been noticed, that all the judges in *Walsh v. Whiteley* agreed in holding "that danger is a defect"² within the Employers' Liability Act; and to have held that a liability arose where a machine was not defective with reference to its purpose if it was so with reference to the danger arising from its use. The scope of this decision must not, however, be extended beyond "dangerous machinery used by children or young persons,"³ despite expressions in the report in the Weekly Reporter which are apparently of a most general application. One of the material facts in it is that "the inspector of factories had warned defendant against employing young persons" on the particular machinery there called in question. The probability, therefore, is that the decision turned on these special facts, and that the principal in *Walsh v. Whiteley*⁴ was in no way involved in the decision, though the report in the Weekly Reporter makes the learned judges assert the decision in *Walsh v. Whiteley* to be the distinct contradictory of the reported judgment, that evidence of a machine being dangerous "does not make it defective in its condition, nor does it imply negligence in the employer if an accident happens."⁵

*Morgan v.
Hutchings.*

To decide what is "plant" within the Act is a matter of more difficulty. Lindley, L.J., in *Yarmouth v. France*⁶ says: "In its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business—not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business."⁷ The question arose in that case whether a horse was plant within the sub-section. On this the Lord Justice observes: "The word 'defect' and the words 'way and machinery,' which occur in the section, throw some doubt on whether plant can include horses; but I do not think the doubt sufficient to require the Court to hold that plant cannot include horses, or to hold that plant must be confined to inanimate chattels. The defendant in this case has a number of horses for

¹ 38 W. R. 412, 6 Times L. R. 219.

² Per Lord Coleridge, C.J., 38 W. R. 412, at 413. "If the machine is dangerous to the man without whose assistance it cannot be worked, and that without any fault of his own, that is a defect in the condition of the machinery. That was the opinion of all the judges in *Walsh v. Whiteley*," per Lord Esher, M.R., 38 W. R. 412, at 413.

³ 9 Times L. R. 219.

⁴ 21 Q. B. Div. 371.

⁵ 21 Q. B. Div. 371, at 379. *Ante*, 840.

⁶ 19 Q. B. D. 647, at 658. Plant must be the defendant's: *Perry v. Brass*, 5 Times L. R. 253; *Robinson v. Watson*, 20 Rettie 144, where carriers sent by waggons to be loaded with coal were held not to be part of the employer's plant.

⁷ See *Blake v. Shaw, Johns* (Page Wood, V.C.) 732.

use in his business; they were part of his plant, not only in the ordinary sense of the word, but also, in my opinion, in the sense in which the word is used in sec. 1, sub-sec. 1, of the Employers' Liability Act." The horse, being vicious, was held to be defective plant, on the ground that whatever renders plant unfit for the use for which it is intended, when used in a reasonable way, and with reasonable care, is a "defect" in the condition within the Act. Lord Esher, M.R., was of the same opinion.¹ Lopes, L.J., expressed no opinion on the point.

Haston v.
Edinburgh
Street Tram-
way Company.

In the Scotch case of *Haston v. Edinburgh Street Tramway Company*² the sheriff held that the word "plant" includes animals used for the purpose of a business. When the case came before the Second Division of the Court of Session there appears to have been no argument on the point, and Lord Young took it as indisputable that horses are plant within the Act; so that permitting a horse unfit to be used to continue at work is conduct that makes an employer liable for a defect in the condition of his plant.³

Injury must be
"caused" by
the defect.

Lastly, the injury must be "caused" by the defect; for it is not enough that a defect exists in some particular, and that injury from the works, ways, &c., occurs subsequently to the existence of the defect. The relation of cause and effect in natural and ordinary sequence is necessary before a liability on the part of the master can be established.⁴

Knowledge.

In connection with what we have been considering must be taken sub-section 3 of section 2, which provides that the workman shall not be entitled to recover where he knew of the defect⁵ or negligence (for the sub-section is of general application and is to be read into all the provisions of the Act) which caused the injury, and did not within a reasonable time⁶ give, or cause to be given, information, either to the employer or to some person superior to himself⁷ in the service of the employer, unless he was

¹ Per Lord Esher, M.R. : The defendant "must use horses and carts or waggons. They are all necessary for the carrying on of the business. It cannot be contended that the carts and waggons are not 'plant.' Can it be said that the horses, without which the carts and waggons would be useless, are not?" This method of reasoning may be yet further extended; *e.g.*, can it be said that drivers, without which horses and carts and waggons would be worse than useless—positively injurious—are not?

² 14 Rettie 621. Cp. *Fraser v. Hood*, 15 Rettie 178.

³ The subject was much discussed during the passage of the Bill through the House of Commons, and an amendment was unsuccessfully proposed on the Report to exclude horses from the definition of plant.

⁴ *Martin v. Connah's Quay Company*, 33 W. R. 216.

⁵ In *Britton v. Great Western Cotton Company*, L. R. 7 Ex. 130, it was said that mere knowledge of a defect does not bar the servant's claim. There must be knowledge of the danger consequent on the defect.

⁶ "Reasonable time" is a matter dependent upon the particular facts, and variable according to circumstances: *Washburn, &c. Company v. Paterson*, 29 Ch. D. 48. See *Stroud Judicial Dictionary*, *sub voce* Reasonable.

⁷ There does not seem ever to have been any question raised as to who is a "person superior to himself in the service of the employer."

aware that the employer or such superior already knew of the defect or negligence.

This has been described by Smith, J.,¹ as a "statutory defence,"^{Statutory defence.} "which theretofore did not exist." Its effect is twofold: First, the workman who knows of a defect or negligence has a reasonable time in which to communicate it to the master or his representative under the section. If, before the "reasonable time" is elapsed, an injury happens, the workman has his right of action unaffected. If the "reasonable time" is elapsed, and no notice is given, then the presumption that the workman takes the risk is raised. This is probably no more than the expression of the workman's right at common law, on the assumption that the defect is not plain and patent at the time when he enters the service.² Secondly, where the workman knows that the employer or the superior has already knowledge of the defect or negligence, he is not bound to renew information of it. At common law in this case his acquiescence will go to shew an acceptance of the risk, unless he have, whether explicitly or implicitly, the master's assurance that the defect shall be remedied.³

Contributory negligence is not affected by this section,⁴ which must be construed as limiting and not as extending the employer's liability.⁵ Consequently, it does not designate the sole case in which the rule expressed by the maxim, *Volenti non fit injuria*, comes in; it rather appears to specify certain requisites—viz., failure to communicate defects or negligence to the master, the proof of which will exonerate the master from liability, even though at common law, in the case of failure to perform a statutory obligation, for example, similar proof would not be sufficient.^{Contributory negligence.}

Secondly, the workman is to be in the same position as a licensee⁶ where he is injured "by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence."^{II. Negligence of any who has superintendence entrusted to him.} The definition clause⁷ limits those having superintendence, which entails chargeability of the master, to persons whose sole or principal duty is that of superintendence, and who are not ordinarily engaged in manual labour."⁸

The words of the sub-section do not confine the superintendence

¹ *Weblin v. Ballard*, 17 Q. B. D. 122, at 125.

² *Eureka Company v. Bass*, 60 Am. R. 152.

³ *Holmes v. Worthington*, 2 F. & F. 533.

⁴ *Stuart v. Evans*, 31 W. R. 706.

⁵ *Thomas v. Quartermaine*, 18 Q. B. Div. 685, per Bowen, L.J., at 693; per Fry, L.J., at 703; *Ayres v. Bull*, 5 Times L. R. 202.

⁶ *Ante*, 839, also 828.

⁷ Sec. 1. sub-s. 2.

⁸ Sec. 8.

Unreported
Case, *Kearney*
v. Nicholls.

to the particular work in which the workman injured is engaged. They extend the employer's liability to the negligence of any person in his service entrusted with superintendence, through which the accident happens. That this at least is the view of Denman, J., appears from the report of a case, *Kearney v. Nicholls*,¹ tried before him on the Northern Circuit, where the negligence was that of the clerk of works engaged in superintending structural alterations in the premises where the plaintiff's intestate was working, which alterations were not connected with the business of the employer. Denman, J., held the employer liable; and his decision appears to be correct, since the sub-section distinctly provides for the negligence of any person in any superintendence in the service of the employer, and is not limited, like the preceding sub-section, to negligence "connected with" the business of the employer.²

Negligence of
a person in
superinten-
dence.

Kellard v.
Rooke.

The negligence must also be (1) that of a person whose principal duty is superintendence, and (2) must be negligence while in the exercise of the superintendence. Thus, as to the first requisite, in *Kellard v. Rooke*,³ the injury was caused through the foreman of a gang of labourers, who was working with them, not giving sufficient warning of the coming of a bale of goods which the gang was engaged in packing, so that the plaintiff was injured. The plaintiff was held disentitled to recover, because a ganger, the foreman of a gang of labourers, who is working with his hands all the day, is ordinarily engaged in manual labour, and so not a superintendent within the Act.

Wright v.
Wallis.

In this case *Wright v. Wallis*⁴ was mentioned, in which the Court of Appeal, apparently sitting as a Divisional Court, set aside a nonsuit by the county court judge where a plaintiff was injured by iron thrown into a barge by a person, according to the evidence of the plaintiff, "at work on the stage, and giving all orders at the time of the accident." From the report it appears that the Court set aside the nonsuit without reference to the fact of the person giving the order being ordinarily engaged in manual labour or not; and possibly because the injury was by reason of the act of a person to whose orders the workman at the time of the injury was bound to conform and did conform, and in consequence of which conformity the accident happened; since Lord Esher, M.R., said: An argument addressed to the Court was "that if you ordered a man to stand in a certain place, and then threw something at him and

¹ (1883) 76 L. T. Newspaper, 63.

² Cp. *Howe v. Finch*, 17 Q. B. D. 187.

³ 19 Q. B. D. 585, 21 Q. B. Div. 367.

⁴ 3 Times L. R. 779 (C.A.).

injured him, the injury was not caused by his conforming to the order, but solely by the subsequent act." Lindley, L.J., however, who was a member of the Court in *Wright v. Wallis*, in *Kellard v. Rooke*¹ explains that decision to have been, that there was not sufficient evidence to shew what was the real position of the person whose negligence caused the injury, and the Court had not the materials to decide it, and sent the case down for further investigation.

On the second point, *Shaffers v. General Steam Navigation Company*² may be referred to. The plaintiff was employed with other workmen in loading corn on board a ship, and, at the time of the accident, was in the hold stowing away the sacks as they were lowered by means of a steam crane. To control the motions of the crane there was a "guy-rope" fastened to it, in charge of a man whose duty it was to stand by the hatchway and to warn the men working below to stand from under, to guide the beam of the crane by means of the guy-rope, and to tell the man who was actually working the crane when to lower and when to hoist. Through the negligence of this man, who neglected to check the movements of the crane by means of the guy-rope, an accident happened, and the plaintiff was injured. The Court was of opinion that, assuming the man whose negligence caused the accident to have been in superintendence, the accident did not occur whilst he was in the exercise of it. The accident arose from his negligence in the capacity of a workman, and not in the capacity of superintendent. However, in the Scotch case of *Sweeney v. M'Gilvray*³ the distinction between negligence in superintendence and negligence in manual labour did not commend itself to the judges, and, though urged in argument, is not alluded to in the judgment. *Shaffers's* case does not seem to have been cited to them. Their decision goes to establish that in Scotland no distinction will be drawn between negligent superintendence and negligence of a superintendent.

Shaffers v.
General Steam
Navigation
Company.

Sweeney v.
M'Gilvray.

Osborne v.
Jackson and
Todd.

*Osborne v. Jackson*⁴ has also been instanced as unfavourable to the distinction.⁵ There the defendant's foreman handed a scaffold plank to a labourer, and called to him to take it, but, though he attempted to do so, it proved too heavy for him to hold, slipped and knocked down a shoring, which fell upon the plaintiff, who brought his action for the injury. The Court here held that the foreman was in the exercise of super-

¹ 21 Q. B. Div. 367, at 370.

² 10 Q. B. D. 356; *Harris v. Tinn*, 5 Times L. R. 221.

³ 24 Sc. L. R. 91.

⁴ 11 Q. B. D. 619.

⁵ *Spens and Younger*, Law of Employer and Employed, 226.

Distinguished
from Shaffers's
case.

intendence, and the order to take the plank, which it was impossible to do safely, was an order in the exercise of superintendence, and not mere manual negligence. The facts sufficiently discriminate the case from Shaffers's case, since the injury was a direct consequence of an improvident order—viz., an inability to execute it. In Shaffers's case the negligence was the result of no order, and was a mere want of attention on the part of a manual labourer in his sphere of work.

It is not negligence for a person in superintendence to give an order for the execution of dangerous work where the nature of the work is obvious, though injury happens in the course of doing what is enjoined;¹ nor is the employer liable, where an injury occurs through an accident arising from the unsafeness of premises, when the person in charge of the work has consulted an expert, and has been advised by him that they are safe—that is, where the actual danger is not self-evident—before ordering his workman to work upon them, even if, through the fault of the expert, they are not in fact safe;² nor yet where in carrying out an order an injury is inflicted on a workman by a “pure accident.”³

Cook v. Stark.

The Scotch case of *Cook v. Stark*,⁴ seems to go rather too far. There it was held by the Second Division of the Court of Session that, though the manager of a work may delegate to others the ordinary operations in use in the work, yet it is his duty to give his personal superintendence to an operation which is dangerous and unprecedented, and that his failure to do so will, in the event of an accident, amount to such *culpa* as will render his master liable in damages under the Act. The learned Lords who held this seem to have overlooked the consideration pointed out by Lord Cairns, C., in *Wilson v. Merry*:⁵ “The result of an obligation on the master personally to execute the work connected with his business in place of being beneficial might be disastrous to his servants, for the master might be incompetent personally to perform the work.” In the case in point this view would appear to have special force, since it would not improbably be disastrous for a general manager personally to have the superintendence of blasting operations; which would much more efficiently be entrusted to an ordinary engineer, not to say to an eminent engineer. Still the case is in accord with the bulk of American authority.

Thirdly, the workman is to be in the same position as a licensee⁶

¹ *Booker v. Higgs*, 3 Times L. R. 618.

² *Moore v. Gimson*, 5 Times L. R. 177; *Kettlewell v. Paterson*, 24 Sc. L. R. 95.

³ *Harris v. Tinn*, 5 Times L. R. 221.

⁴ 14 Rettie 1.

⁵ L. R. 2 Sc. App. 326, at 332.

⁶ *Ante*, 839, also 828.

where he is injured "by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where the injury resulted from his having so conformed."¹

III. Where the workman is injured by reason of the negligence of some one to whose orders he was bound to conform.

The scope of this provision is indicated in a judgment of Lord Craighill in the Scotch case of *Dolan v. Anderson*.² He says: "I see in the terms of the enactment no foundation for any distinction of classes upon this subject. The question is not whether the person who gave the orders or directions occupied a high or a humble position in the works. It is simply whether, whatever was his position, he was one to whose orders or directions at the time of the accident the workman injured was bound to conform. If he was, the words of the statute are satisfied, and a limitation of their operation for the purpose of restricting the benefit the statute was intended to confer would be, not an interpretation of the words of the clause, but a capricious interference with its application." To the same effect is Lord Young in *M'Manus v. Hay*:³ "As I understand the expression in the statute, 'to whose orders or directions the workman at the time of the injury was bound to conform,' it means that the relative position of the parties was such that the one owed obedience to the other, and that the order was such that it could not be declined without contumacy."

Dolan v. Anderson.

Lord Young in *M'Manus v. Hay.*

In *Bunker v. Midland Railway Company*⁴ the Court laid considerable stress on the provision that the injured person not only does conform to orders, but is *bound* so to do. The plaintiff in that case was van guard in the defendants' service, and was under the age of fifteen. There was a rule of the company known to the plaintiff that no van guard under the age of fifteen was to drive a van. The defendant's foreman promised plaintiff extra money to drive a van; the plaintiff consented, and whilst so engaged was injured. The Queen's Bench Division held that he had no right of action, since he was not bound to obey the order given to him.⁵ This ruling is identical with what has been decided in Scotland in *M'Manus v. Hay*,⁶ where Lord Young

Bunker v. Midland Railway Company.

¹ Sec. 1, sub-s. 3.

² 12 Rottie 804, at 808.

³ 9 Rottie, 425 at 429.

⁴ 47 L. T. 476. Cp. *Snowden v. Baynes*, 25 Q. B. Div. 193; *Murphy v. Smith*, 19 C. B. N. S. 361; and the American case, *Union Pacific Railroad Company v. Fort*, 17 Wall (U.S.) 553.

⁵ In *Murley v. Osborn*, 10 Times L. R. 388, the jury found that the order given was one the plaintiff was bound to obey. The evidence on which they found this is by no means clear. Indeed it would appear from the facts that in giving the order the foreman was transgressing rules binding on himself and the plaintiff. If so, *Bunker v. The Midland Railway Company* appears directly in point, and no indication is given in the report of any assumption of overruling it. If, on the other hand, there was evidence to warrant the finding of the jury, there does not appear room for any difficulty in the decision.

⁶ 9 Rottie 425.

says :¹ "As I understand the expression in the statute (to whose orders or directions the workman at the time of the injury was bound to conform) it means that the relative position of the parties was such that the one owed obedience to the other, and that the order was such that it could not be declined without contumacy."

Millward v.
Midland Rail-
way Company.

Assuming, however, that the plaintiff is bound to obey an order, there is no need for the order to be by express words; it will be for the jury to say whether the order was to be implied from the circumstances.² The facts in *Millward v. Midland Railway Company*³ shewed that plaintiff, a boy, was engaged under a carman in unloading three frames from a van. The method that ought to have been adopted was that of untying the three frames, then tying two of them up again, and removing the third. The method actually adopted was to untie the three frames, then to remove the first, without waiting to see the two remaining frames secured. The boy, without express orders, assisted in this operation and was injured. The Court held there was evidence that he had conformed to the carman's orders, which, though not expressly given, were implied from the course adopted in co-operating with the carman.

Cox v. Hamil-
ton Sewer Pipe
Company.

This decision was generalized in the Canadian case of *Cox v. Hamilton Sewer Pipe Company*⁴ into the formula: "No specific order at the time of the injury is requisite—general prior orders suffice."

Sweeney v.
M'Gilvray.

To this sub-section may more appropriately be referred the case of *Sweeney v. M'Gilvray*,⁵ before alluded to. Evidence was given that if the workmen had refused to do what was required of them they would have been told to "look for another job." This evidence, in the opinion of the majority of the Court, concluded the case; though, as has before been noticed, there remained the point that the injury resulted through negligent co-operation in the execution of an order not negligently given, and not from conformity to an order which in itself was reasonable and which could be safely carried out. *Shaffers v. General Steam Navigation Company*⁶ does not appear to have been cited to the Court, though *Osborne v. Jackson and Todd*⁷ was.

M'Manus v.
Hay.

In *M'Manus v. Hay*⁸ the sheriff held that if the order is a proper one, then subsequent negligence is not actionable merely because it occurs in the carrying of it out. That view has been

¹ L. c. at 429.

² *Millward v. Midland Railway Company*, 14 Q. B. D. 68, per Day, J., at 70.

³ 14 Q. B. D. 68; approved *Wild v. Waygood* (1892) 1 Q. B. 783; *Barber v. Burt*, 10 Times L. R. 383.

⁵ 24 Sc. L. R. 91.

⁷ 11 Q. B. D. 619.

⁴ 14 Ont. R. 300, per Boyd, C., at 311.

⁶ 10 Q. B. D. 356.

⁸ 9 Rettie, 425.

disputed.¹ "It seems that that construction is not correct, and that the wording of the sub-section is wide enough to include *some* injuries resulting from obedience to an order not itself negligent, where the injury has been caused by the negligence of the person who gave the order." The justness of this criticism is contingent on the closeness of the connection established between the giving of the order and the negligence that follows it. The liability of the master in the case in point is, so far as liability is regulated by the Act, dependent on conformity of the workman to orders "where the injury resulted from his having so conformed." In law the injury must be the ordinary natural sequence from the neglect which produces it;² and it would seem, unless some special rule of interpretation is to be applied, that the injury must be the natural sequence of conformity. To produce the injury in the case suggested another cause must be introduced—negligence; and it is of this that the injury is the consequence and not of having conformed to a proper order. The fact that the workman conformed to an order not in itself negligent is only the condition, and not the cause, of the injury, and which in ordinary case would not give a cause of action against the person responsible for the order; while, so far from the action being given by the Act, it in terms provided that the injury must have resulted from having conformed to the orders; and this, except in a perverted and non-natural sense, which is nowhere imposed on the words, was not the case.

This argument derives countenance from *Martin v. Connah's Quay Alkali Company*.³ The plaintiff was engaged upon a defective waggon. The foreman called to him to be quick; whereupon, in order to save time, he gave a signal for the engine to which the waggon was attached to move. The effect was that, having started the engine, he tripped over loose bricks, lost his footing, and was injured. The Court drew a distinction between "the immediate cause" and the "remote cause" of the accident; and held that the plaintiff could not recover, as the accident was not "caused" by the defect, though it appears that had there been no "defect" there would have been no accident; since the condition of things from which the accident arose would not have existed.⁴

In *Wild v. Waygood*,⁵ however, the defendant's argument was that the accident in respect of which the action was brought was

¹ Roberts and Wallace, *Employers' Liability*, (3rd ed.), 276.

² See Wharton, *Negligence* (2nd ed.), §§ 97 *et seqq.*

³ 33 W. R. 216.

⁴ *Cp. Coyne v. Union Pacific Railway Company* 133 U. S. (26 Davis) 370. The facts are set out, *ante*, 825.

⁵ (1892) 1 Q. B. 783.

Judgment of
LordHerschell.

not caused by conformity to the orders of the man whose negligence caused the injury, in the sense of conformity being the *causa causans*, but only in the sense of its being the *causa sine qua non*, and that the section did not include responsibility for such remote consequences. The plaintiff stood on a plank in conformity to orders when the man who gave the orders was guilty of an act of negligence, which caused the injury by upsetting the plank. This argument was unsuccessful, Lord Herschell¹ saying: "It is not necessary to endeavour in the present case to determine or lay down any general rule as to the construction of this section beyond this, that I am quite clear it is not limited to an injury arising from an order, which order is negligent in itself. That is one contention put before us. I think the words used in the Act of Parliament are conclusive against any such construction. It would be limiting it far beyond what the words either require or will admit of. That is all I lay down as regards the construction of the section, beyond this: that I do not think it essential to shew that the conformity to the order was what has been called the *causa causans* of the injury. The negligence must be proved, and if you prove the negligence then it is sufficient if, in addition to proving that, you also prove that the injury resulted, not from the negligence alone, but from the negligence and the conforming to the order." Kay, L.J., considered² the three possible constructions of the sub-section; first, that the negligence from which the injury arises must be in the order itself; secondly, that any negligence is aimed at that may occur while conforming to an order; or, thirdly, that the only negligence within the section is that which is "closely connected with the order that is given." He concluded that the third construction was the correct one. Of this close connection, a phrase the Lord Justice subsequently varies by speaking of an "intimate connection," he refrains "from attempting to give any general definition that might govern other cases,"³ and is content with holding that the case before him "does come within the true meaning and intent of the third sub-section, and that is one of the very cases which it was intended to meet." Lindley, L.J., points out⁴ that under the section "five things must be proved. First, injury to the plaintiff; secondly, negligence of some person in the service of the defendant; thirdly, that the person was one to whose orders the plaintiff was bound to conform; fourthly, that the plaintiff did conform to those orders; fifthly, that the injury resulted in his

Judgment of
Kay, L.J.

Judgment of
Lindley, L.J.

¹ (1892) 1 Q. B. at 789.

³ (1892) 1 Q. B. at 796.

² (1892) 1 Q. B. at 795.

⁴ (1892) 1 Q. B. at 793.]

conforming thereto"; and he suggests the test "that the injury must be the result of negligence of the person giving those orders and of the plaintiff conforming to those orders. It will not do to prove one of these things only; the injury must be the result of the two, and if the two are so connected together as to cause the injury, then it appears to me that the case comes within this section."

It is observable that nowhere is it said that where conformity is merely the *sine qua non* of the accident, that liability attaches. For instance, a workman says to workmen who are bound to conform to his orders, "You stand here, you here, you here," and in course of the work the one next to him is injured through his negligence in doing his part of the work; it is not said in *Wild v. Waygood*¹ that the master would be liable. The utmost extent the case goes is to include, in the words of Lindley, L.J.,² those cases where "it is impossible to say that the injury was not caused by those two things, viz., negligence of the person giving the order, and conformity with the order," where, that is, probably, the conformity to the order is an element in the injury and not the mere antecedent of it—a co-operating cause in the actual result and not a mere step toward the result." The master is liable for a complex result, but not for a simple result posterior to conformity to orders.

This seems the conclusion from what Lord Herschell says in *Wild v. Waygood*,¹ dissenting from the remarks of Lord Coleridge, C.J., in *Howard v. Bennett*.³ In that case two men were working a machine; one had to start it, the other to co-operate in working it; an order was given and conformed to, immediately on which, and negligently, the machine was started and the person conforming was injured. Lord Coleridge, C.J., there held that: "The injury resulted, not from the directions given, but from the machine being set off too soon and at too great a speed." Lord Herschell, commenting on this, says:⁴ "I cannot agree that in that case the injury which is caused by the negligent starting of the machine in such circumstances is not an injury which results from conforming to the order given. The order given was to put his hand in a certain part of the machine, which is a part where his hand will be in immediate danger if the machine is started; and his hand being there, the negligence consists in starting the machine whilst his hand is there. Under such circumstances as those, there seems to me the most immediate and intimate connection that one can con-

¹ (1892) 1 Q. B. at 791.

³ 58 L. J. (Q. B.) 129, at 130.

² (1892) 1 Q. B. at 794.

⁴ (1892) 1 Q. B. at 792.

ceive between the negligence which caused the injury and the conforming to the order, because it is in truth one element of the negligence that he was conforming to the order at the time." If, then, the conforming to the order is an ingredient in the wrongful act, as distinguished from a mere antecedent of it, the liability of the master does not end with the *causa causans*, but is prolonged so as even to include the *causa sine qua non*. Thus, while it is tolerably plain that the master would not be liable where a proper order is given, by one in superintendence, to which the workman conforms and, in the subsequent course of working, is injured by an independent negligent act; and, on the other hand, it is equally plain that he would be liable where a proper order is given which concurs with a negligent act so that the joint effect produces injury; there is a third class of cases where the relation between the proper order and the negligent surroundings is too indeterminate to be more definitely formulated than it is by Kay, L.J., using the phrase that there must be an "intimate connection" between the order and the negligence producing the injury. Of this last class of cases *Wild v. Waygood* is a type, where the result is dependent more on the effect produced on the Court by the particular facts proved, at they may appear to approximate either to the first or second class above designated, than by reference to any general rule whatever.

Workmen in
the employ of
"butty-men."

Both in Scotland¹ and in England² it has been held that where workmen are in the employ of "butty-men," who enter into a contract with the owners of the mine to get coal, and are injured by others engaged in the same system of work, they are within the provisions of the Act. When, however, two workmen are working together, for example, in cleaning and working a machine, and the one too hastily starts the machine, so that the other is injured, this is no more than the negligence of a fellow-workman, to which the Act does not apply,³ of course on the assumption that one is not subordinate to the other.

Kettlewell v.
Paterson.

The case of *Kettlewell v. Paterson*⁴ was also decided under this sub-section. A working glazier, who had been supplied by his employer with suitable scaffolding for doing the glazier work at a building, was directed by the foreman to make use of another scaffold, which had been erected by persons who had the contract at the same building for joinery work. This scaffold gave way in consequence of the joiner having carelessly constructed it of

¹ *Morrison v. Baird*, 10 Rettie 271, at 280.

² *Brown v. Butterley Coal Company*, 2 Times L. R. 159.

³ *Howard v. Bennett*, 58 L. J. (Q. B.) 129, considered and explained *Wild v. Waygood* (1892), 1 Q. B. 783, at 791.

⁴ 24 Sc. L. R. 95.

defective materials, and the glazier was injured. The scaffold was the work of a competent workman; and it was not shewn that the defect could have been observed by such examination as the foreman glazier was bound to make. The Court held that there was no negligence, since the foreman of the glazier was warranted in making use of a scaffold erected by a competent tradesman. This same ground would have protected the employer had the negligence alleged been a defect in the condition of ways, works, &c., under the 1st section.

Fourthly, the workman is to be in the same position as a licensee¹ where he is injured "by reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or bye-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf," "unless the injury resulted from some impropriety or defect in the rules, bye-laws, or instructions therein mentioned."² "Where a rule or bye-law has been approved or has been accepted as a proper rule or bye-law by one of her Majesty's Principal Secretaries of State or by the Board of Trade or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or bye-law."³

IV. Workman injured by act or omission of person acting under bye-laws, &c.

By the common law³ if a business is carried on in obedience to rules or bye-laws, such rules and bye-laws are part of the employment, and accidents arising from them are within risks which both the contracting parties are held to contemplate as incidental to the employment.⁴ This principle is subject to two limitations—

(1) Where the employer is cognizant of a latent defect of which the workman has not knowledge or not equal means of knowledge, the employer is liable for injury received through the risk;⁵ and

Two limitations:
(1) Where workmen not equal means of knowing.

(2) The employer is bound to see that the dangers attendant on the system of working are not unnecessarily increased by the absence of due care and reasonable means of prevention.⁶

(2) Where dangers unnecessarily increased.

The section works a change in the law by providing that where anything is done under a rule or bye-law regulating an

¹ *Ante*, 839, also 828.

² Sec. 2, sub-s. 2.

³ As to the effect of defective rules at common law, *Vose v. Lancashire and Yorkshire Railway Company*, 2 H. & N. 728.

⁴ *Clarke v. Holmes*, 7 H. & N. 937, per Cockburn, C. J., at 944. *Weems v. Mathieson*, 4 Macq. (H. L. Sc.) 215.

⁵ *Bartonshill Coal Company v. Reid*, 3 Macq. (H. L. Sc.) 266.

⁶ *Williams v. Clough*, 3 H. & N. 258.

establishment, the natural result of which is to work injury to a workman the employer is liable. The same principle applies where, under a rule or bye-law, some act is omitted which would otherwise have been done, and injury is caused. In other words, if the working of a rule or bye-law results in injury, inefficiency of the rule or bye-law is to be presumed; and this is so, though at common law the working might be said to be under the conditions imposed by the rule or bye-law. The meaning is pointed more clearly by the proviso that where the rule or bye-law is approved or sanctioned by the Government authorities therein specified, the employer shall not be liable, even though in its working the rule or bye-law shall have brought injury to a workman.

Effect of this provision on the application of the maxim *Volenti non fit injuria*.

The inquiry is next suggested, What is the effect of this upon the defence involved in the maxim *Volenti non fit injuria*? The decisions¹ say that this defence remains to the employer. The Act says that the workman is to be in the position of a licensee where the injury occurs through the injurious operation of bye-laws, &c., which form part of the system under which the workman is employed, unless in certain excepted cases.

Effect would be given to the words of the Act, and to the law as laid down by the decisions, by considering that before the Act the fact of working on a system governed by rules would imply a voluntary undertaking of the risks involved in them; while by the provisions of the sub-section a change is made in the *onus*; on proof that injury has resulted from bye-laws a presumption is raised that the employer is liable for their ill operation, which may be rebutted by shewing that their working was known and might have been anticipated by both parties.

Again, the rules may have been imposed subsequently to the workman entering the employment. Then, at common law, the rights of the workman are greater than when he enters upon an employment under conditions prescribed and manifest.² It may well be that the effect of this sub-section is to place a workman, in the particulars enumerated, in the same position under the statute as he would have been in at common law, where he went on working after discovering a risk, without a full and conscious acceptance of its danger.

It is pretty obvious that the act or omission must be under the rules or bye-laws, and that an act or an omission not contemplated by the bye-laws cannot be brought under the section.

Particular instructions.

Particular instructions probably indicate orders given through a person without authority acting as the mouthpiece of a person

¹ Thomas v. Quartermaine, 19 Q. B. Div. 685.

² Clarke v. Holmes, 7 H. & N. 937; Holmes v. Worthington, 2 F. & F. 533.

with authority; but there is no decision or authority interpreting this portion of the Act.

A distinction has been taken between definite instructions given by the employer to a person, and instructions afterwards to be particularly formulated and delivered by the delegate. It seems useless to canvass the origin of the instructions, since the Act merely requires that they should be particular instructions when promulgated to the workman, as distinguished and apart from rules and bye-laws which are in the nature of general instructions; so that, however they emanate, they would seem to affect the employer with liability if they are issued by his authority, are improper or defective, and injury has resulted therefrom.¹

Fifthly, the workman is to be in the same position as a licensee where he is injured "by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway."²

V. Workman may recover where injured by the negligence of any person in the service of the employer who has the charge or control of any signal points, &c., on a railway.

The definition clause of the Act,³ which we shall consider more minutely presently, provides that the expression "workman" means, amongst other things, "a railway servant." The present sub-section appears to have been introduced for their benefit.

The decisions upon this section have placed the natural, as distinguished from a technical, meaning on the terms used. Thus, in *Doughty v. Firbank*⁴ it was held that railways used by colliery owners and others upon which trains run are within the section, which is not to be limited in its applications to railways used by railway companies; and in *Cox v. Great Western Railway Company*⁵ trucks coupled together in the usual way, though with no locomotive engine attached, and only a stationary hydraulic engine and a capstan by which they were moved, were held to constitute a train. In *Murphy v. Wilson*⁶ an attempt to comprehend under the term "locomotive engine" a steam crane so fixed on a trolley that, by means of shifting gear working on the axles of the trolley, the crane and trolley could be moved from one place to another along rails, was unsuccessful. Pollock, B., thus expressed his view: "The term 'locomotive engine' has a well-known significance, and is used generally for an engine to draw a train of trucks or cars along a permanent or temporary set of rails. There is also a well-known class of engines, such as traction engines, which, though they are capable of being moved from place to

Doughty v. Firbank.

Cox v. Great Western Railway Company.

View of Pollock, B.

¹ *Whatley v. Holloway*, 6 Times L. R. 353 (C. A.), where an instruction to do a certain thing was held not to imply the instruction to do it unreasonably or without the ordinary precautions requisite to do it safely.

² Sec. 1, sub-s. 5.

⁴ 10 Q. B. D. 358.

⁶ 52 L. J. Q. B. 524.

³ Sec. 8.

⁵ 9 Q. B. D. 106.

place, are never spoken of as locomotive engines.¹ If the Legislature had intended to include any such machine, they would have used proper terms. I can see no reason why the defendants in this case should be held liable under this section any more than if it were a case of a steam printing machine or a punching machine."

Scope of the sub-section.

By the interpretation clause "workman" means a railway servant amongst others; therefore any person who can bring himself within the meaning of the term is entitled to recover, not, indeed, for the negligence of any other railway servant, but for the negligence of those classes of railway servants who are specified in the sub-section—that is, those "in charge or control of any signal, points, locomotive engine, or train upon a railway."

"Charge or control."

Gibbs v. Great Western Railway Company.

On the meaning of the governing words of this sub-section, "charge or control," Gibbs v. Great Western Railway Company² is the authority. A workman in the signal department of the defendants' railway had to clean, oil, and adjust the points and wires of the locking apparatus at various places along a portion of their line; for this purpose he was subject to an inspector, who was responsible for the points and locking gear, which were moved and worked by men in the signal boxes. This workman took the cover off some points and locking gear in order to oil them, and negligently left it projecting over the metals of the line, and so caused injury to a fellow-workman. It was sought to render the company liable for the neglect as that of a person in the service of the employer who has the charge or control of points. Both in the Divisional Court and in the Court of Appeal the attempt failed. In the Divisional Court, Field, J., discussing the meaning of "charge or control," doubted "whether the words 'charge or control' are intended to mean different things"; Mathew, J., thought that the Legislature had in contemplation "the negligence of some person having charge or control of the points for the purposes of traffic and of movement." In the Court of Appeal, Brett, M.R.,³ draws a distinction between charge and control. His words are: "I cannot think that there is any colour for saying he [the plaintiff] had the control of the points, and the only question is whether he is a person who had the charge of them within the meaning of the statute. I think that to be such a person he should be one who has the general charge of the points, and not one who merely has charge of them at some particular moment." Lord Coleridge, C.J., too, discussing whether the workman whose fault was alleged had charge or

Judgment of Brett, M.R.

Judgment of Lord Coleridge, C.J.

¹ But see Powell v. Fall, 5 Q. B. Div. 597. ² 11 Q. B. D. 22, 12 Q. B. Div. 208.
³ 12 Q. B. Div. at 212.

control, said :¹ " He certainly had to do something from time to time to the machinery connected with the points, but he himself said he worked under the direction of Saunders [the inspector], and Saunders was called and he proved, I think, that he was the person who had apparently both the charge and the control of the points, and that Fisher [the workman] was only a workman under him, and was not a person who had either the charge or the control of any points connected with the railway."

A good deal of ingenuity has been (extra-judicially) expended on the question whether a tramway is a railway within the section. Originally, doubtless, and in general usage the terms may have been convertible. Now, however, a distinction is drawn,² and the principle that was at the root of the decision in *Murphy v. Wilson*³—that words expressing well-known objects are to be confined in their ordinary usage to the designation of them—avails in this case also.

Is a tramway
a railway?

Where the workman establishes his right to compensation under the Act, the amount he may recover is limited to " such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade, employed during those years in the like employment and in the district in which the workman is employed at the time of the injury."⁴

Compensation.

In *Bortick v. Head*⁵ a Divisional Court, overruling the county court judge, decided that the Act did not lay down a measure of damages, but merely imposed a limit beyond which damages should not be recovered; so that, when a jury estimated a sum for overtime work which the plaintiff had earned for another employer than the one in whose service the plaintiff was injured, the plaintiff was allowed to recover the sum so assessed.

Bortick v.
Head.

Overtime
earnings.

In Scotland,⁶ in the Sheriff Courts, damages awarded for the death of a man who has left a widow and a child or children have been apportioned, the widow being allowed half, " the other half being reserved for the children when they came to sue."

Damages
awarded.
In Scotland.

In England the matter is regulated by section 2 of Lord Campbell's Act,⁷ whereby the damages may be apportioned amongst those entitled " in such shares as the jury by their verdict shall find and direct."⁸ Where the action is brought

¹ L. c. at 210.

² The Tramways Act, 1870, (33 & 34 Vict. c. 78.) See *Swansea Improvements and Tramway Company v. Swansea Urban Sanitary Authority* (1892), 1 Q. B. 357.

³ 52 L. J. Q. B. 524.

⁴ Sec. 3.

⁵ 53 L. T. 909.

⁶ Spens and Younger, *Law of Employer and Employed*, 317. Cp. *Sanderson v. Sanderson*, 36 L. T. 847.

⁷ 9 & 10 Vict. c. 93; amended by 27 & 28 Vict. c. 95. This Act does not apply to Scotland. *Ante*, 209.

⁸ 9 & 10 Vict. c. 93, s. 2.

in the Chancery Division, it has been decided that the Court has power to apportion in such manner as a jury could have done.¹

Time for giving notice and bringing action.

Notice that injury has been sustained must be given within six weeks² from the occurrence of the accident causing the injury, and the action must be commenced within six months from the same date. In the case of death resulting, the time to bring an action is extended to twelve months; the want of notice is no bar to the maintenance of the action "if the judge shall be of opinion that there was reasonable excuse for such want of notice."³

Johnston v. Shaw.

In the Scotch case of *Johnston v. Shaw*,⁴ the plaintiff sought to excuse non-compliance with the provision for the bringing of action within six months, alleging that, between the time of giving the notice and the expiration of the six months, he was confined in a lunatic asylum in consequence of his faculties having become impaired by reason of the accident. The provision was, however, held obligatory, and it was ruled that, beyond the time mentioned, no action under the Act could be maintained.

Clark v. Adams.

Clark v. Adams,⁵ another Scotch action under this section, raised a somewhat peculiar point. An action was brought at common law, and was decided against the pursuer, who appealed to the Court of Session. At the hearing of the appeal it was stated that the pursuer had become aware that he had given notice under the Employers' Liability Act, 1880, and he sought to treat his common law action as if it had been brought under the statute. The Court seem to have considered that this might be done within the six months,⁶ but held that since the time specified in the Act had elapsed it was not possible in the particular case before them.

Penalty.

Any penalty which is paid to the injured workman in pursuance of any Act of Parliament is to be deducted from the compensation payable in respect of a cause of action under this Act; and where the action has been brought previously to the payment of any penalty, the workman is not to be entitled to receive any such penalty paid in respect of the same cause of action.⁷

¹ *Bulmer v. Bulmer*, 25 Ch. D. 409.

² In *M'Donagh v. M'Clellan*, 13 Rettie 1000, the injury was suffered on the 7th of May, and the notice was sent by post, so that the employers could not receive it before the 19th of June. Held, too late.

³ 43 & 44 Vict. c. 42, s. 4. See *Previdi v. Gatti*, 58 L. T. 762; *M'Leod v. Pirie*, 20 Rettie 381.

⁴ 21 Sc. L. R. 246.

⁵ 12 Rettie 1092.

⁶ *Morrison v. Baird*, 10 Rettie 271; *Murray v. Steel*, 12 Rettie 945; this seems to have been a sort of informal procedure under section 6. In Scotland it has been held that the question whether the omission to send notice of injury to the employer is reasonable may be decided either at the adjustment of issues, or at the trial, in the discretion of the judge. *Trail v. Kelman*, 15 Rettie 4.

⁷ Sec. 5.

The class of Acts in which provision is made for a penalty partly payable to the workman comprehends such Acts as the Coal Mines Regulation Act, 1887,¹ the Metalliferous Mines Regulation Act, 1872,² the Metalliferous Mines Act, 1875,³ and the Factory and Workshop Act, 1878.⁴

Actions⁵ under the Employers' Liability Act, 1880, are to be brought in a County Court,⁶ but may be removed into a Superior Court in the same mode and for the same causes that other actions may be removed.⁷ Where an action is tried in a County Court before a judge without a jury, one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.⁸ Regulations may be made as to procedure and the consolidation of actions in the same manner as they are made with regard to other actions in County Courts.⁹

Actions to be brought in a County Court

The rule that should govern in England in deciding applications to remove actions under the Act from the County Court to the Superior Court is that they are only to be allowed "if some new question of law is raised, or some very difficult question in the particular case, for instance, as to the way in which the machinery caused the injury. The removal is in the discretion of the judge, and I should think that in his discretion he would, except in very peculiar circumstances, leave the case in the County Court."¹⁰

Rule respecting removal of actions from County Courts.

This rule is identical with that laid down in the earlier case of *Munday v. Thames Ironworks and Shipbuilding Company*,¹¹ where Manisty, J., doubted whether an action at common law could be consolidated with one under the Act; since "the ordinary prin-

Munday v. Thames Ironworks and Shipbuilding Company.

¹ 50 & 51 Vict. c. 58, ss. 59-70. See Guthrie Smith, *Law of Damages* (2nd ed.), 368, for a general account of these Acts.

² 35 & 36 Vict. c. 77, ss. 31-38. See also Quarries Act, 1894 (57 & 58 Vict. c. 42).

³ 38 & 39 Vict. c. 39.

⁴ 41 Vict. c. 16, part iii. s. 82; amended by 46 & 47 Vict. c. 53, and further amended by 54 & 55 Vict. c. 75.

⁵ Sec. 6, sub-s. 1. *The Queen v. Judge of City of London Court*, 14 Q. B. Div. 905; decided on 28 & 29 Vict. c. 108, s. 39, repealed and re-enacted as s. 62 of County Courts Act, 1888 (51 & 52 Vict. c. 43).

⁶ In Scotland this means the Sheriff Court, and in Ireland the Civil Bill Court.

⁷ By *certiorari*, or order under ss. 126, 129, 130, 132 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), which supersede 9 & 10 Vict. c. 95, s. 90, and 19 & 20 Vict. 108, s. 38, and now regulate the removal of cases from a County Court. The application for removal is ordinarily made to a master (R. S. C. 1883, O. liv. r. 12) or judge at chambers. Under the repealed Acts it could only be made to a judge at chambers; *Robertson v. Womach*, 19 L. J. Q. B. 367; *Staples v. Accidental Death Insurance Company*, 10 W. R. 59. As to refusal to order removal, see *Munday v. Thames Ironworks and Shipbuilding Company Limited*, 10 Q. B. D. 59. As to removal on ground of prejudice, *Bates v. Warner*, 5 Times L. R. 582 (C. A.).

⁸ Sec. 6, sub-s. 2.

⁹ Sec. 6, sub-s. 3. See County Court Rules, 1889, Order xlv.

¹⁰ Per Brett, M.R., *The Queen v. Judge of City of London Court*, 14 Q. B. Div. 905, at 907. As to the principles regulating the practice in Scotland, *M'Avoy v. Young's Paraffin Light and Mineral Oil Company*, 9 Rettie 100.

¹¹ 10 Q. B. D. 59.

Morrison v.
Baird.

ciple is that if there is a statutory proceeding for a particular cause of action and compensation is recovered, though limited in amount, an action at common law for large¹ damages shall not be maintained. If proceedings have been taken before a magistrate and a penalty or damages recovered, an action for the same cause cannot afterwards be brought.”² This may be explained by considering *Morrison v. Baird*³ in the Second Division of the Court of Session, where a distinction is pointed out between cumulative and mutually exclusive remedies. “I cannot conceive,” says the Lord Justice-Clerk (Moncreiff), “that the Legislature ever intended that there should be both a common law and a statutory action. . . . The ground upon which the action is brought—the ground of liability—is a common law liability; and the only effect of the statute is, in the case of fellow-workmen, to take away a plea which might exclude such an action based upon the common law in the event of the wrong complained of having been done by a fellow-workman.” Lord Young, who gave the succeeding opinion, observed:⁴ “I agree with your Lordship that it is not incompetent to combine the common law and the provisions of the Employers’ Liability Act in the same action.”

Difference
between the
Scotch and
the English
systems.

This manifestly means no more than that a workman is not to recover damages twice over for the same injury, though he may claim in the alternative. This, under the Scotch system, in which the Sheriff Courts have unlimited jurisdiction, may readily be done; in England the County Court would not have jurisdiction beyond the £50 limit except under the Act, so that claims in the alternative would be to that extent hampered, though that does not constitute a reason why they should not be pursued so far as they may avail. Manisty, J., was probably thinking of the case of a plaintiff recovering under the Act, and then, with a view to secure larger damages, bringing his action at common law in the Superior Court; in which case he would plainly be disentitled.⁵ If, however, he is to be understood as affirming that a workman may not frame his action in the alternative either under the Act or at common law, then the Act does not say so; and the general rule of law in the case of the existence of two remedies is otherwise.⁶ Does, then, the fact that simultaneous actions are brought

¹ Probably this is a misprint for “larger.”

² Cp. *Midland Railway Company v. Martin* (1893), 2 Q. B. 172.

³ 10 Rettie 271.

⁴ *L. c.* at 278.

⁵ See *Seddon v. Tutop*, 6 T. R. 607, per Grose, J. at 609. The only inquiry is whether the same cause of action has been litigated and considered in the former action. Cp. *Brunsdon v. Humphrey*, 14 Q. B. Div. 141.

⁶ *Bagot v. Easton*, 7 Ch. D. 1.

in different courts make a difference? If it does, either or both of the actions would not be maintainable. This, however, is not so; a stay must be obtained, and that only with regard to the part common to the two actions.¹

Again: if an action under the Act is brought and fails, can the plaintiff proceed anew at common law? For instance, an action against an employer fails through want of notice of action, and the plaintiff commences a common law action. Such action could be maintained on the principle laid down by Willes, J., in *Langmead v. Maple*:² "The conditions for the exclusion of jurisdiction on the ground of *res judicata* are that the same identical matter shall have come in question already in a court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been finally decided. . . . It is not sufficient to constitute *res judicata* that the matter has been determined on; it must appear that it was controverted as well as determined upon."³ If an action is brought under the Act for the negligence of the master, and the plaintiff fails by the negligence alleged being disproved, on the same principle a common law action cannot be brought. If not proved, the ordinary rules relating to nonsuits would apply. There remains the case of an action brought at common law and failing, and subsequently an action commenced under the Act. This, too, seems referable to the ordinary principles relating to *res judicata*.

Notice of action⁴ in respect of injury shall give—

Notice of
action.

- (a) The name and address of the person injured.
- (b) Shall state in ordinary language—(1) the cause of the injury; (2) the date at which it was sustained.
- (c) Shall be served—
 - (a) If the employer is a private person, on him; or, if there is more than one, on one of them; and either (1) by delivering the same to the person on whom it is to be served, (2) by delivering it at his residence or place of business, (3) by posting it in a registered letter addressed to the person on whom it is to be served at his last-known place of residence or place of business;

¹ *Morton v. Quick*, 26 W. R. 441.

² 18 C. B. N. S. 255, at 270.

³ "Although a declaration contains counts under which the plaintiff's whole demand might be recovered, yet, if no attempt has been made to give evidence of some of the claims, they may be recovered in another action. This was decided in *Seddon v. Tutop*, 6 T. R. 607, and that decision has been confirmed by subsequent cases in the King's Bench and Common Pleas." *Thorpe v. Cooper*, 5 Bing. 116, per Best, C.J., at 129.

⁴ Sec. 7. *M'Leod v. Pirie*, 20 Kettie 381.

(3) If the employer is a body of persons corporate or unincorporate—(1) by delivering the notice at the office or any one of the offices of the body, (2) by sending it by post in a registered letter to the office or any one of the offices of the body.

A notice is not to be deemed invalid “by reason of any defect or inaccuracy,”¹ unless the defect or inaccuracy, in the opinion of the judge who tries the action, (1) prejudices the defendant in his defence, *and* (2) “was for the purpose of misleading.”

Moyle v.
Jenkins.

Written
notice
essential.

In *Moyle v. Jenkins*² the contention was that the requirements of section 4 were satisfied by *verbal* notice; but the Court held that, supposing that to be so if section 4 stood alone, yet it was so far affected by the terms of section 7 as to make a written notice necessary. This view was sustained by the Court of Appeal in the case of *Keen v. Millwall Dock Company*,³ where Lord Coleridge, C.J., expressed the further opinion that a notice, to satisfy the Act, must be contained in one document. “If,” he said,⁴ “the letter relied on in this case had referred to some written document in which the nature and particulars of the injury were given it would not, I should have thought, have been a compliance with the words of this enactment, which describes the notice as one and single, containing in it the incidents which the statute has required it to contain as a condition precedent to maintaining any action.” The better opinion seems to be that this is not essential. “I agree,” said Brett, L.J.,⁵ “that, as a general rule, the notice must be given in one notice, but I am not prepared to say it would be fatal if it were contained in more than one notice.” Holker, L.J., concurred in this opinion.

Lamley v.
Mayor, &c., of
East Retford.

In another case,⁶ under section 264 of the Public Health Act, 1875, Lord Esher, M.R., with whom Bowen and Fry, L.JJ., concurred, definitely laid down that “it is not necessary that the whole of a notice of action be set out in one document.” So that unless some distinction can be taken between the notice

¹ In *Carter v. Drysdale*, 12 Q. B. D. 91, the omission of the date was held a “defect or inaccuracy” that did not render the notice invalid; and in *Stone v. Hyde*, 9 Q. B. D. 76, a letter from plaintiff’s solicitor giving the date of injury, and stating that the plaintiff for some time past had been at a hospital under treatment “for injury to his leg,” was held a mere “defect or inaccuracy,” and not such an omission as to make the document “no notice at all.” This was followed in *Cox v. Hamilton Sewer Pipe Company*, 14 Ont. R. 300.

² 8 Q. B. D. 116.

8 Q. B. Div. 482.

³ L. c. at 484.

⁴ L. c. at 485.

⁵ *Lamley v. Mayor, &c., of East Retford*, 55 J. P. 133.

required under the Employers' Liability Act, 1880, and that formerly required under the Public Health Act, 1875, it may be concluded that a valid notice of action can be collected from two or more documents.

With regard to the method of serving notice, there is an important decision of the First Division of the Court of Session,¹ on the point whether a notice sent by letter is good if the letter is not registered. Evidence was given that a letter not registered was posted and forwarded to the defenders who, in answer to a further letter sent after the expiration of the six weeks, admitted its receipt, and stated they had forwarded it to the secretary of an insurance company. The Lord President (Inglis) said it was quite indispensable under the Act "that notice of an action should be served within six weeks, and, if it is not so served, the action is not maintainable. This is plain enough, but the point now to be considered is regarding the manner of serving the notice. The statute provides two modes in which it may be done, first, by 'delivering the same to or at the residence of place of business of the person on whom it is to be served.' That is plainly a notice by a 'delivered' letter, as distinguished from a posted letter. The second mode is 'by post by a registered letter'—that is to say, the pursuer may avail himself of the Post Office as a means of service, and that by means of a registered letter. The reason why the letter is to be registered is that the pursuer is not to be entitled to avail himself of the presumption of ordinary correspondence, that a letter, when posted, is presumed to have reached its destination unless it is returned from the Dead Letter Office. But if, in addition to posting the letter, the pursuer registers it, that, under the statute, creates a presumption that the letter will reach its destination. This is expressed by the last clause of the third paragraph of section 7 of the Act, which says, 'And in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered.' That clause will not preclude the defender proving, as matter of fact, that the letter did not reach him; just as little will it preclude the pursuer from proving that though the letter was not registered, it did, as matter of fact, reach the defender. Now, that has been proved as matter of fact here."²

Service of
notice.

Judgment of
the Lord
President
Inglis.

An employer under the Act includes a body of persons corporate or unincorporate.³

Employer
includes
corporation.

¹ *McGovan v. Tancred*, 13 Rottle 1033.

² Where service by post is dealt with in any Act subsequent to 1889, see the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 26.

³ Sec. 8. Under the existing Act no action can be maintained against the represen-

Workman¹ is defined to mean "a railway servant and any person to whom the Employers and Workmen Act, 1875,² applies."

It is pointed out³ that the term railway servant comprehends every servant of a railway. It is at least doubtful whether in an Act whose object is "to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service," and in which railway servant is used in collocation with workmen, those servants of a railway would be included to whom its provisions are not otherwise applicable.

Employers
and Workmen
Act, 1875.

By section 10 of the Employers and Workmen Act, 1875,⁴ "the expression workman does not include a domestic or menial servant, but . . . means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour,⁵ whether under the age of twenty-one or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

Seamen.

By section 13 "this Act shall not apply to seamen or to apprentices to the sea service."⁶

Women
included.

By The Interpretation Act, 1889,⁷ words importing the masculine gender shall include females, unless a contrary intention appears.

Domestic ser-
vants not
within the Act.

Domestic and menial servants are not within the Act.

A "domestic servant" is one who in ordinary circumstances resides in the master's house, though this test is not conclusive.⁸ It has been held that the determination of whether a servant is a menial servant or not is a question of the facts in each particular case.⁹

Menial
servant.

A menial servant is a somewhat more extensive term. Thus,

tatives of a deceased employer. *Gillett v. Fairbank*, 3 Times L. R. 618. Cp. a curious American case, *King v. Henkie*, 60 Am. R. 119. As to the operation of the maxim *Actio personalis moritur cum persona*, ante 209 et seqq.; also see *Martin v. Baltimore Railroad Company*, 151 U.S. (44 Davis) 673.

¹ Sec. 8.

² 38 & 39 Vict. c. 90.

³ *Roberts and Wallace, Employers' Liability* (3rd ed.) 231.

⁴ 38 & 39 Vict. c. 90.

⁵ As to manual labour, *M'Leod v. Pirie*, 20 Rettie 381. "Forewoman of a laundry" was held not a description such as to convey to the Court knowledge one way or another as to the scale or proportion of manual labour in the vocation, *Moore v. Ross*, 17 Rettie 796.

⁶ In *Oakes v. Monkland Iron Company*, 11 Rettie 579, a servant employed on board a vessel solely used on a canal was held not to be a seaman. In *Froy v. Balmain Steam Ferry Company*, 7 N. S. W. R. (Law) 146, an engineer of a steam ferry boat was held not within the Act as not ordinarily engaged in manual labour.

⁷ 52 & 53 Vict. c. 63, s. 1, sub-s. 1.

⁸ *Graham v. Thomson*, 1 Shaw 309.

⁹ *Lawler v. Linden*, Ir. R. 10 C. L. 188.

a head gardener, living outside the house, but upon the property, has been held to be a menial, though not a domestic servant.¹ Domestic servants are those occupied in the service of the master's house; menial servants those engaged on the establishment. Servants in either of these classes are, by the exception in the definition, taken out of the operation of the Act; were this not so, they would come within it as labourers.

In *Wilson v. Glasgow Tramway Company*,² under the Em-
 ployers and Workmen Act, 1875, a decision previously to the
 passing of the Employers' Liability Act, a tramway conductor was
 held "not other than a labourer employed to attend on the tram-
 way cars as much so as a miner employed to work a windlass or the
 gearing of a pit, or a man engaged to drive the horses of a track-
 boat on a canal."³ This is inconsistent with *Morgan v. London*
General Omnibus Company,⁴ in the English Court of Appeal,
 where an omnibus conductor was held not to be a labourer within
 the definition, since "his real and substantial business is to
 invite persons to enter the omnibus and to take and keep for his
 employers the money paid by the passengers as their fares; in
 fact, he earns the wages becoming due to him through the confidence
 reposed in his honesty."⁵ In *Cook v. North Metropolitan Tramways*
*Company*⁶ the driver of a tramcar was held to be excluded from
 the benefit of the Act because the expression used is "manual
 labour" and not "manual work"—that is, work apart from the
 necessity of thought and skill. On the other hand, the plaintiff
 in *Yarmouth v. France*⁷ was held to be within the definition of
 "work-man" in the Employers and Workmen Act, 1875. "He
 is," said Lord Esher, M.R.,⁸ "a man who drives a horse and trolley
 for a wharfinger. We must take into account what his ordinary
 duty was. He has to load and unload the trolley. That is
 manual labour. His duty may be compared to that of a lighter-
 man who conducts a barge or lighter up and down the river.
 The driving the horse and trolley and the navigating the lighter
 form the easiest part of the work; his real labour, that which
 tests his muscles and his sinews, is the loading and unloading of
 the trolley or the lighter."

Tramway and
 omnibus
 conductors.
Wilson v.
Glasgow
Tramway
Company.

Morgan v.
London Gene
ral Omnibus
Company.

Cook v. North
Metropolitan
Tramways
Company.

¹ *Nowlan v. Ablett*, 2 C. M. & R. 54. In Ireland a *steward* and gardener was held not to be "a menial servant": *Forgan v. Burke*, 12 Ir. C. L. R. 495, at 498. In *Nicoll v. Greaves*, 33 L. J. C. P. 259, a huntsman was held a menial servant. Cp. *Ogle v. Morgan*, 1 De G. M. & G. 359; *Vaughan v. Booth*, 16 Jur. 808.

² 5 Rottie 981.

³ *L. c.* per Lord Justice-Clerk Moncreiff, at 988.

⁴ 12 Q. B. D. 201, 13 Q. B. Div. 832.

⁵ *L. c.* per Brett, M.R., at 834.

⁶ 18 Q. B. D. 683.

⁷ 19 Q. B. D. 647. See *Leech v. Gartside*, 1 Times L. R. 391.

⁸ 19 Q. B. D. per Lord Esher, M.R., at 651.

Test
applicable.

The inquiry in these cases is mainly one of fact, that is, whether the duties in any case performed are mainly manual or mainly mental.¹ The question was again brought before the Court of Appeal in *Bound v. Lawrence*,² in the case of a grocer's assistant, when the test applicable was determined to be an inquiry what is "the nature of the substantial employment" unaffected by consideration of "matters that are incident and accessory."³

Labourer.

The term labourer under 2 Geo. II. c. 19, has been held to extend to labourers of all descriptions, as, for instance, to a labourer who had contracted to dig and stem a well for cattle, to be paid by the foot,⁴ and who employed another to assist him in the work, though not to a caretaker⁵ of goods seized under a *fi. fa.*, nor "a carpenter, a bailiff, nor the clerk of a parish."⁶

Servant in
Husbandry.

A dairymaid who, besides cooking and making beds, assisted in harvest work, has been held not necessarily excluded from the definition of "servant in husbandry."⁷ A waggoner is clearly a servant in husbandry.⁸ So is "a man employed to dig the ground";⁹ but a person engaged by the owner of a farm to keep the general accounts of the farm, to weigh out the food for the cattle, to set the men to work, to lend a hand in anything if wanted, and in all things to carry out the orders given to him is not; because "his chief duty was to keep the general accounts belonging to the farm. From that, it should seem that his position was rather that of a steward than of a servant."¹⁰

Journeyman.

As to journeymen. "Etymologically considered," says Day, J.,¹¹ "a journeyman is one who is employed by the day; but that is not the sense in which the term is ordinarily used, for in most trades where journeymen are employed—butchers, bakers, and

¹ *Hunt v. Great Northern Railway Company* (1891), 1 Q. B. 601, contains a discussion by Pollock, B., of what constitutes a workman under the Employers and Workmen Act, 1875. The workman in question happened to be a railway servant, so that the case is not directly an authority under the Employers' Liability Act, 1880; *Lamb v. Great Northern Railway Company* (1891), 2 Q. B. 281, note at 282.

² (1892) 1 Q. B. 226; *Jackson v. Hill*, 13 Q. B. D. 618 is to the same effect.

³ (1892) 1 Q. B. per Fry, L.J., at 229.

⁴ *Lowther v. Earl of Radnor*, 8 East. 113.

⁵ *Branwell v. Penneck*, 7 B. & C. 536.

⁶ *Morgan v. London General Omnibus Company*, 13 Q. B. D. 832, per Brett, M.R., at 833.

⁷ *Ex parte Hughes*, 23 L. J. M. C. 138; see, too, *Clarke v. M'Naught, Arkley (Sc.)* 33, where it was held that a servant engaged by a farmer to act as "kitchen-woman and byre-woman" came within the class of "servants in husbandry."

⁸ *Lilley v. Elwin*, 11 Q. B. 742.

⁹ Per Brett, M.R., *Morgan v. London General Omnibus Company*, 13 Q. B. Div. 832, at 834.

¹⁰ Per Crompton, J., *Davis v. Lord Berwick*, 3 E. & E. 549, at 553.

¹¹ *Morgan v. London General Omnibus Company*, 12 Q. B. D. 201, at 206.

tailors, for instance,—they are hired and paid by the week.” And in the same case, in the Court of Appeal, Brett, M.R., says: “A ‘journeyman’ is a man who is working for a master, such as a carpenter.”¹

An “artificer,”² says the same learned judge, in the same place, is a skilled workman, and a “handicraftsman” is the same. The term “miner” would include all persons employed in underground working in search of minerals. A quarry is distinguished from a mine as being “a place upon or above and not under ground.”³ Quarrymen, if not held to be miners within the contemplation of the Act,⁴ would yet be within it as “otherwise engaged in manual labour”; which has been expounded by Brett, M.R.,⁵ to mean “any person engaged in the same way as all the others are engaged, although they do not go by the same names.”⁶

In a New South Wales case,⁷ plaintiff, being the owner of a couple of carts, went, when it suited him, to the brick-kiln of the defendants, and took bricks away to the places on the defendants' works where they were required; for which he received a specified sum of money. He was not bound to do the work, though, if he thought fit to do it, he was paid. While the plaintiff was loading, the roof of the kiln fell in, and he was injured; for which injuries he sued under the Act, claiming under the words a “contract of service or a contract personally to execute any work or labour”; the Supreme Court held him disentitled to recover, because a contract to be within the words must be a contract to personally serve or to serve for some period or to do some particular work. “It seems to me that the contract must be for the personal doing of the work by the plaintiff who brings an action of this sort.”⁸

The definition of workman does not include those who are working in Government departments; and for two reasons—

First, the rights of the Crown are not affected by any Act in which the Crown is not specially named.⁹

Secondly, the Crown is not liable for torts committed by its servants.¹⁰

¹ 53 L. J. Q. B. 352, at 353. The passage is not in the Law Reports.

² This includes a stoker or fireman; *Wilson v. Zulueta*, 14 Q. B. 405; a calico pattern designer: *Ex parte Ormrod*, 1 D. & L. 825; a superintendent of rooms: *Leech v. Gartside*, 1 Times L. R. 391; and the overseer of a printing-office: *Bishop v. Letts*, 1 F. & F. 401.

³ Per Turner, L.J., *Bell v. Wilson*, L. R. 1 Ch. 303.

⁴ *Devonshire v. Rawlinson*, 28 J. P. 72.

⁵ *Morgan v. London General Omnibus Company*, 53 L. J. Q. B. at 353.

⁶ As to “a contract personally to execute any work or labour,” see *Sadler v. Henlock*, 4 E. & B. 570.

⁷ *Lobb v. Amos*, 7 N. S. W. R. (Law) 92.

⁸ Per Sir James Martin, C.J., at 96.

⁹ Bac. Abr. Prerog. (E) 5.

¹⁰ *Johnstone v. Sutton*, 1 T. R. 493; *Buron v. Denman*, 2 Ex. 167. *Ante*, 262 et seqq.

Workmen may contract themselves out of the Act.

Under the Employers' Liability Act, 1880, an express contract by which the workman engages to forego the benefits of the Act in the event of injury is valid;¹ since section 1 of the Act only negatives the implication of an agreement by the workman to bear the risks of the employment, but does not forbid the constitution of an express agreement.

¹ *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357. Messrs. Roberts and Wallace, *Liability of Employers* (3rd ed.), 465-466, suggest that the provisions of the Truck Act, 1831 (1 & 2 Will. IV. c. 37), were applicable to the agreement in *Griffiths v. Earl of Dudley*. But if the wages of a workman + risk are 30s. a week, can wages at 25s. — risk (in respect of which the employer undertakes to pay 5s. to an insurance fund), be wages of which any part is "made payable otherwise than in current coin." Assuming they are, see *Hewlett v. Allen* (1892), 2 Q. B. 662, affirmed in H. L. (1894), App. Cas. 383; also *Chawner v. Cummings*, 8 Q. B. 311; *Archer v. James*, 2 B. & S. 61, where the Ex. Ch. were equally divided.

The rule of law as to contracting out of a liability imposed by statute has been the subject of so much discussion that it may be well to summarize the authorities. The maxim of law is *Quivis renunciare potest juri pro se introducto*, *Bovill v. Wood*, 2 M. & S. 23, per Bayley, J., at 25; or as it appears in Cod. 2, 3, 29, *Omnes licentiam habere, his, quæ pro se introducta sunt, renunciare*. Cp. *Wilson v. Macintosh* (1894), App. Cas. 129, at 133.

In *Rowbotham v. Wilson*, 8 E. & B. 123, at 151, Martin, B., says: "I cannot perceive any reason, either at law or otherwise, why parties should not be at liberty, by apt words, either to add to, or qualify, or make more or less extensive, the right which the law of itself provides and imposes, or, if they think fit, declare that such rights shall not exist at all. *Quilibet potest renunciare juri pro se introducto*." Again, Erle, C.J., in *Rumsey v. North-Eastern Railway Company*, 14 C. B. (N. S.) 641, at 649, says: "It is undoubtedly competent to any man to renounce a privilege which is given to him by a statute." Lord Westbury, C., draws attention to the words *pro se* in the maxim, which he says have been introduced to shew that "no man can renounce a right which his duty to the public, which the claims of society, forbid the renunciation of." *Hunt v. Hunt*, 31 L. J. Ch. 161, at 175. See also *Markham v. Stanford*, 14 C. B. N. S. 376, per Byles, J., at 383; *Morten v. Marshall*, 2 H. & C. 305.

In *Printing and Numerical Registering Company v. Sampson*, L. R. 19 Eq. 462, at 465, Jessel, M.R., says: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by Courts of justice." This passage is cited and approved by Fry, L.J., in *Rousillon v. Rousillon*, 14 Ch. D. 351, at 365, and by Chitty, J., in *Tullis v. Jackson*, (1892), 3 Ch. 441, at 445. Holmes, *The Common Law*, 205. See also *Wallis v. Smith*, 21 Ch. Div. 243, per Jessel, M.R., at 266. As to the argument of "public policy," Burrough, J., says, *Richardson v. Mellish*, 2 Bing. 229, at 252: "I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

"Public policy," as a ground of legal decision, is exhaustively treated in the leading case of *Egerton v. Earl Brownlow*, 4 H. C. L. 1. Pollock, C.B., in advising the Lords, summarizes the cases as establishing the distinction, "that where a contract is directly opposed to public welfare it is void, though the parties may have a real interest in the matter, and an apparent right to deal with it." See also per Bowen, L.J., in *Maxim Nordenfelt, &c., Company, v. Nordenfelt* (1893), 1 Ch. 630, at 665, affirmed in H. L. 10 Times L. R. 636.

Invito beneficium non datur D. 50, 17, 69, and *Pacta quæ contra leges constitutionesque vel contra bonos mores fiunt nullam vim habere, indubitati juris est*, Cod. 2, 3, 6, are the competing principles of the Roman law.

In *Clements v. London and North-Western Railway Company* (1894), 2 Q. B. 482, a contract waiving rights under the Employers' Liability Act, 1880, in consideration of advantages under an accident fund, was held a valid contract by an infant as being for his benefit; while in *Flower v. London and North-Western Railway Company* (1894), 2 Q. B. 65, an agreement by an infant with a railway company was held not binding as being to his detriment, whereby, in consideration of their permitting him to travel

The Employers' Liability Act, 1880, which would have expired at the end of the session in 1888, was continued by 51 & 52 Vict. c. 58 until the 31st of Dec. 1889, and has since been continued annually by the Expiring Laws Continuance Act. Expiration of
the Act.

on their railway to and fro between the place where he lived and the colliery where he worked, on special terms, he agreed not to make any claim against the company for injuries sustained through their negligence.

END OF VOL. I.

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